REPORT
ON
THE MECHANICS' LIEN ACT:
CERTAIN SUBSTANTIVE ISSUES

NEWFOUNDLAND LAW REFORM COMMISSION

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MAY 1990

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NEWFOUNDLAND LAW REFORM COMMISSION

May 1990

The Honourable Paul D. Dicks, Q.C.
Minister of Justice and Attorney General
Confederation Building
St. John's, NF
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Dear Minister:

Pursuant to the provisions of *The Newfoundland Law Reform Commission Act, 1971*, I have the honour to present to you the Commission's *Report on The Mechanics' Lien Act: Certain Substantive Issues.*

J. Derek Green, Q.C.
Chairman

CHAPTER 1

APPROACH AND SCOPE OF STUDY

1. Introduction

The subject of this *Report* is the reform of the law relating to liens in the construction industry, the so-called "mechanics' lien." The mechanics' lien was not part of the English common law or equity. It is entirely a creature of statute. It may be traced to the European civil law tradition and to the early Roman law upon which it was based. One of the earliest reported Newfoundland decisions dealing with mechanics' liens noted that ". . . the lien of mechanics' and others introduced a novel feature into our law and legislation unknown to English law . . ."[1]

The necessity or justification for mechanics' lien legislation lies in the inadequacy of ordinary contractual remedies to deal with the complex inter-related web of claims that characterize the typical construction project. The contractual framework within which the typical construction project operates may be given a pyramidal characterization. At the apex of the pyramid sits the owner of the realty who in the normal case contracts with a general or prime contractor for the construction of an improvement. The improvement itself may have been designed by the owner, the contractor or by a separate professional under contract. Some of the work may be done by the general contractor and his crew; in the usual case, however, the general contractor will subcontract particular aspects of the job to specialized tradesmen. Both the general contractor and the subcontractor will in turn obtain materials from any number of suppliers. Thus, there develops a complex multi-layered web of inter-connected relationships composed of owner, general contractor, subcontractors, material suppliers, labourers and those who provide services. Notwithstanding the interconnected nature of this chain, relying solely on notions of contractual privity the parties at each level have payment and performance claims only against the parties in the construction pyramid immediately above or below them. However, parties may be greatly affected, indeed placed seriously at risk, by the actions of persons within the chain other than those with whom they have contractual relationships. If, for example, the owner refuses to pay for the work done on his premises, those at the bottom of the construction pyramid, who, in fact, have done most of the work, have no contractual claim against him.

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1 *Lynch* v. *Trainor and Aylward*, (1893) 7 Nfld. & L.R. 740 at 745 (per Carter, C.J.N.).

The purpose of the mechanics' lien is to ensure that, despite the absence of privity, he who receives the benefit (the owner) also bears the burden of paying.[2] This is achieved by giving to those who improve the value of the owners' interest in the land a lien upon his estate or interest in that land in the amount of the sum justly due and owing.

Lien legislation granting secured rights to those who perform labour or furnish materials for the improvement of real property was first introduced in North American common law jurisdictions in Maryland in 1791. Since that time, similar statutory enactments have been passed in all states of the United States and in all Canadian provinces.[3] The first Canadian Acts came into force in Ontario[4] and Manitoba[5] in 1873. The Newfoundland statute was passed on June 11, 1890.[6] The law of England still contains no such legislation, though specialized procedures do exist for the conduct and carriage of construction litigation in that jurisdiction.[7]

2. Legislative History

Unlike larger Canadian jurisdictions which have witnessed the periodic revision of lien legislation at fairly regular intervals,[8] the legislative history of the statute in Newfoundland has been relatively uneventful. An enactment bearing the title "Of the liens of Mechanics and Others" (53 Vict., cap. 18) was passed in the Colonial Legislature on June 11, 1890. The Act closely paralleled its Ontario counterpart; indeed, shortly after passage it was described as "almost, *ipsissimis verbis*, a transcript of the Mechanics' Lien Act of that province, which runs on the same lines with similar Acts long in operation in the United States."[9] The Ontario legislation was amended seven times during the first twenty-five years of its existence.[10] The Newfoundland enactment, by comparison, remained virtually unchanged for over three-quarters of a century. The Act of 1890 appears in the statute revision of 1952 following Confederation with Canada as *The Mechanics' Lien Act*, R.S.N. 1952, c. 263. Major substantive amendment appeared only with the advent of *The Mechanics' Lien Act 1970*, S.N. 1970, No. 24; this Act, proclaimed

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2 See *Hickey* v. *Stalker* (1923), 53 O.L.R. 414 at 415 (Ont. C.A.) where Meredith, C.J.C.P., says: "Speaking generally, the object of the Mechanics' Lien Act is to prevent owners of land getting the benefit of buildings erected and work done at their instance on their land without paying for them."

3 Berman and Waitzer, "Which Way to Lien?" 5 C.B.L.J. 470 at 476 (1980-81).

4 36 Vict., cap. 27 (Ont.).

5 36 Vict., cap. 31 (Man.).

6 53 Vict., cap. 18 (Nfld.).

7 *Supra*, n. 3.

8 Eg. Ontario; see *supra* n. 3 at 470.

9 *Supra* n. 1 at 749 per Little, J.

10 *Supra* n. 3 at 470.

into force on January 1, 1972, significantly revised and expanded its predecessor and may be seen as an attempt to bring the initial legislation of 1890 in line with eighty years of developments in industry and trade. Aside from minor alterations in 1971,[11] 1974,[12] and 1979,[13] it is the legislation currently operative within the Province.

The legislation of 1970 constituted a marked advance; however, it has proved to be anything but a complete panacea. It has been suggested, for example, that by virtue of the absence, among other things, of trust provisions, it is not clear that as presently framed the Act provides sufficient protection to those it is primarily intended to protect. Furthermore, after eighteen years of experience, it has become evident that many of the notions which the Act does introduce, for example, substantial performance, have been the source of much confusion and have made the enactment anything but easy to apply by those directly affected by it. Indeed, it has been said in a recent judgment from the province's Supreme Court that observations by Mr. Justice Little in 1893 concerning the statute's". . . apparently obscure or complex provisions. . ."[14] are as apt today as they were almost 100 years ago. Clearly, the area is one ripe for reform.

3. Ministerial Reference

The Commission's study of *The Mechanics' Lien Act*, R.S.N. 1970, c.229, originated as a reference under Section 7(1)(c) of *The Newfoundland Law Reform Commission Act*, S.N. 1971, No. 38. The matter was referred to the Commission from the Minister of Justice who, in response to submissions received from industry, trade and the various professionals serving the construction industry, including lawyers, architects and engineers, requested

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11 S.N. 1971, No. 47.
12 S.N. 1971, No. 57 (Sch.) and No. 84.
13 S.N. 1979, c. 33, Sch. C.
14 *McLoughlin Supplies Ltd.* v. *Elliston Developments Ltd.* (1988), 30 C.L.R. 141 at 147 (Nfld. S.C.T.D. per Steele J.)

that the Law Reform Commission undertake a review of this Province's lien legislation. The request directed the Commission's attention to five specific issues. These were:

1. whether the protection currently afforded subcontractor's and material suppliers to construction projects was adequate;
2. whether present holdback provisions were adequate;
3. whether alteration of present notice and limitation periods would be beneficial;
4. whether the Crown should be lienable; and
5. whether trust provisions similar to those contained in Ontario's *Construction Lien Act, 1983*, S.O. 1983, c. 6, should be considered for inclusion in this Province's lien legislation.

As a result of the ministerial request, research was undertaken pursuant to Section 7(2) of the Act. A comparative review of legislation and jurisprudence from other jurisdictions, primarily Canadian, was carried out.[15] Further, in an effort to obtain a hands-on indication of industry's assessment of the difficulties currently being experienced, the Commission invited written submissions from bodies and organizations involved in the provincial building trades and held hearings designed to facilitate open dialogue amongst the various interest groups affected by the legislation.[16] The upshot of this process was the Commission's *Working Paper on The Mechanics' Lien Act: Certain Substantive Issues* (NLRC-WP3) which canvassed the applicable law in some detail and contained tentative recommendations for reform. That *Working Paper*, published in April 1988, was widely circulated. It generated interest throughout the industry. Though, as was to be expected, there was disagreement amongst the various interest groups within the

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15 The following were among the law reform efforts contained in our *Working Paper*: Ontario Law Reform Commission, *Report on the Mechanics Lien Act* (1966), hereinafter referred to as "The Ontario Report;" Ontario Law Reform Commission, *Supplementary Report on The Mechanics Lien Act* (1967), hereinafter referred to as "The Ontario Supplementary Report;" Law Reform Commission of British Columbia, *Report on Debtor Creditor Relationships: Part 2 Mechanics' Lien Act: Improvements on Land* (1972), hereinafter referred to as "The British Columbia Report;" Nova Scotia Law Reform Advisory Commission, *Mechanics' Liens: A Study Paper*, prepared by Peter E. Darby, December 31, 1973, hereinafter "The Nova Scotia Report;" Manitoba Law Reform Commission, *Report on Mechanics' Lien Legislation in Manitoba* (1979), hereinafter "The Manitoba Report;" Alberta Institute of Law Research and Reform, Report No. 30, *The Builders Lien Act: Certain Specific Problems* (1979), hereinafter "The Alberta Report;" Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (1980), hereinafter "The Ontario Discussion Draft;" the Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (April 1982), hereinafter "The Ontario Committee Report;" Saskatchewan Department of Justice, *Liens in the Construction Industry* Report by the Special Advisory Committee to the Minister of Justice on Builder's Liens, August 1984, hereinafter "The Saskatchewan Committee Report."

16 See Appendix A to this Report.

construction pyramid as to the detail and extent of change required, there was agreement that the present legislation was obscure, often productive of unjust and inequitable results and in urgent need of reform. A clear consensus emerged that a systematic and complete review was long since overdue.[17]

The recommendations contained in this *Report* have been developed in light of the submissions and comments generated by our *Working Paper.* Appendix B to this *Report* contains a list of respondents to that work. The Commission would like to thank those, both within and without the Province, who provided us with comment. They provided us with additional information and, in some instances, challenged us to rethink some of our initial, tentative proposals. We believe this final *Report* and the recommendations contained herein have benefitted greatly from this process.

4. Abolition or Reform?

In our *Working Paper* the Commission raised and dismissed as a viable reform option outright repeal of the existing enactment.[18] A submission from the Law Reform Committee of South Australia suggested that we might re-consider this view. It was pointed out that the antipodean experience has been that the majority of Australian states and New Zealand which enacted mechanics' lien legislation in the 1890's have since repealed it without any adverse effects: "The reason for repeal of the various Acts was the strong views of the mercantile community that liens added too much to building costs, slowed down building construction, and caused banks to refuse to lend more money until the lien had been cleared from the title."[19]

It was noted, however, that since doing away with these statutes a number of Australian jurisdictions have opted for new legislation, the effect of which is to augment the ordinary common law contractual remedies which are not entirely effective within the complex web of relationships characteristic of the construction setting with new rights for subcontractors and their workmen. The new legislation allows moneys payable to the principal contractor to be made subject to charges for the benefit of subcontractors and workmen. This is obviously in recognition of the special problems that arise within the construction pyramid with respect to securing payment.[20]

The weight of Canadian opinion is overwhelmingly in favour of the retention of builders' lien (mechanics' lien) legislation. In a *Report* which

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17 A similar view has been expressed recently by the Province's Supreme Court; see *McLoughlin Supplies Ltd.* v. *Elliston Developments Ltd. et. al* No. 2 (1988), 30 C.L.R. 1 at 6 where Cameron J. notes that the case therein before her "... demonstrates clearly some of the deficiencies of and the need for reform of *The Mechanics' Lien Act.*"

18 NLRC-WP3 (April 1988) at 4-10.

19 Law Reform Committee of South Australia; *Comments on Working Paper on The Mechanics' Lien Act: Certain Substantive Issues.*(July 1988) at 4.

20 See NLRC-WP3 (April 1988) at 11-15.

has appeared since publication of this Commission's *Working Paper* a joint Government/Industry Task Force on builders' liens in Alberta states again the predominant view in this country:

> Since lien rights are an historically accepted part of the construction and energy industries in every common law province as well as in virtually every State of the Union, the Task Force was unanimous in its recommendation not to recommend repeal of the Act.[21]

Likewise, the Northwest Territories Committee on Law Reform in a *Working Paper* received subsequent to the release of our study notes that it does not favour abolition of that jurisdiction's statute. One of the reasons given for this stance was the following:

> The unique position of the parties in the construction process whom lien legislation is designed to protect. They are essentially producing an immoveable object, on someone else's property, on credit. Mechanics' lien legislation stands as an attempt to deal more fairly with these parties.[22]

This Commission remains of the view that the remedies provided by mechanics' lien legislation should continue to be made available. Unlike the situation in Australia, there appears to be general agreement in this province and in other Canadian jurisdictions that, although there is a need for change, such changes as might be made should be directed at modernizing and improving the operation of the lien statute. Moreover, as noted in the Northwest Territories study, it appears the Act has become a positive integral factor in the provision of credit within the construction industry. McGuinness makes this point as follows:

> [T]he inherent peculiar nature of construction activity requires the provision of extensive credit by suppliers in that industry, as an integral and essential part of the construction process. The provision of such credit creates a need for a means of providing for that credit. Security is needed in order to coerce payment, where a person refuses to pay for the services or materials that have been supplied to him, and also to provide creditors with salvage protection, where that person is unable to pay for the work that has been done for him. The complexity of contractual relationships in the construction industry make the free negotiation of such protection a practical impossibility in most cases.[23]

Lien legislation makes eminently possible what might otherwise be "practically impossible." The regulatory regime which the Act creates provides construction suppliers with rights which enable them to compel payment. These rights facilitate the granting of credit and thereby promote production

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21 *Builders Liens: Towards Greater Assurance of Payment*, September 1988, Alberta.

22 Northwest Territories Committee on Law Reform, *Mechanics' Lien Law in the Northwest Territories* (1988) at 2.

23 McGuinness, *Construction Lien Remedies in Ontario* (1983) at 118. McGuinness provides a full profile of the Canadian Construction scene in Chapter 3 of his book at p. 53f.

within the construction industry.[24] We believe that given the present provincial economic atmosphere and the general state of health of the industry what is warranted at this time is not outright repeal but rather reform designed to fine-tune the operation of the legislation. We take this premise as the point of departure for our study of the five issues outlined in the minister's reference on this matter to us.

5. Reform Approach

Having rejected abolition in favour of reform the question that arises is whether such changes as are proposed should be set within the present Act or whether the legislation should be entirely re-written. In our *Working Paper*, we took the tentative position that an attempt should be made to fit the proposed changes within the structure of the existing legislation.[25] We indicated that if, after a reasonable trial period, it was found that more radical steps were required, further consideration might be given at that time to drafting an entirely new statute. A number of developments have caused us to rethink this tentative proposal.

First, in its Brief in response to the Commission's *Working Paper*, the Special Committee of the Law Society of Newfoundland with respect to *The Mechanics' Lien Act* wrote:

> The Commission has proposed that the suggested amendments be incorporated into the existing legislation rather than adopting modern new statutory language, based, for example, on the Ontario Act. If only minor amendments were proposed, this approach would be appropriate. However, the Commission has recommended the inclusion of trust provisions, a major revision to the existing legislation. We have serious doubts that such major amendments can be easily grafted into the existing legislation. The resulting product will be an untried and untested piece of legislation which may well generate considerable litigation. We believe that the resulting uncertainty would not be in the best interests of the construction industry or the Province as a whole. We believe the better approach would be to adopt a new Act based on an existing model, such as Ontario. Obviously, not all provisions may be applicable or suitable to the Newfoundland experience. The model would have to be sculptured to meet Newfoundland conditions.[26]

There can be no doubt, as this Brief suggests, that the proposals for reform put forward in the Commission's *Working Paper* are of a far-reaching nature. If implemented, they would result in much more than a simple tidying-up of the existing statute.

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24 *British Columbia Report*, *supra* n. 15 at pp. 23-24.
25 NLRC-WP3 (April 1988) at 9-10.
26 *Report of the Special Committee of the Law Society of Newfoundland with Respect to the Mechanics' Lien Act* (November 1988).

Second, a number of recent judicial decisions implicitly question the wisdom of piecemeal amendment of legislation as complex as *The Mechanics' Lien Act*, particularly where major reform is intended, and point out that some of the most significant defects in the existing legislation arise as a result of previous unsuccessful incrementalism. In *McLoughlin Supplies Ltd.* v. *Elliston Developments Ltd. et. al (No. 1)*,[27] when considering the substantial performance amendment of the 1970 revision, Steele J. notes *inter alia* as follows:

> Section 13(1) [of *The Mechanics Lien Act*] reads in part that the person primarily liable upon any contract under which a lien may arise shall, as the work is done or materials are furnished, "retain for a period of thirty days after the completion . . . of the work done", 10 per cent of the value of the work and materials. The section speaks in terms of the *completion* of the contract. Referring to s.2(1)(a) of the Act, the interpretation section, it will be seen that "'completion of the contract' means, subject to subsections (2) and (3) of this Section 2, substantial performance, not necessarily total performance, of the contract." That definition first appeared in *The Mechanics' Lien Act*, R.S.N. 1970. . . . [S]. 13(1) uses the phrase, "completion . . . of the work done or to be done under the contract," whereas s. 23(1) speaks in terms of the "completion of the contract." My reading of the Act is that the two phrases are synonymous and the language of s. 13(1), "completion. . . of the work done or to be done under the contract" means "completion of the contract," which by virtue of s. 2(1)(a) means substantial performance, not necessarily total performance of the contract. *This is just another example of a very old statute, copied from the laws of another jurisdiction, amended in a piecemeal fashion where consolidation and rewriting of the legislation is long overdue.*[28] [Emphasis added.]

A complete rewrite might help avoid the incongruities of the earlier attempts at amendment and seems doubly advisable in light of the scope of reform which the Commission proposes.

Third, the trend across the country appears to be towards new statutes, contemporary in language and principle and more in line with the modern realities of the construction industry. Ontario,[29] Manitoba[30] and Saskatchewan[31] have recently adopted new statutes; Alberta and British Columbia appear ready to follow suit shortly. There is no doubt that the old legislation was cast in the language of the 19th century. Despite the inevitable technicalities, due in large part to the complex nature of the activities which such legislation seeks to regulate, there is growing recognition that every attempt should be made to frame new legislation in clear and precise English. The language of the statute should be more accessible to those who use and

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27 *Supra* n. 14.
28 *Ibid.* at 150.
29 *The Construction Lien Act, 1983*, S.O. 1983, c.6.
30 *The Builders' Lien Act*, S.M. 1980-81, c. B91.
31 *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1.

are affected by it on a daily basis. Therefore, rather than fit the proposed amendments within the linguistic framework of the existing Act, the demands of clarity, consistency, and accessibility might be better met by a new statute.

The Commission is persuaded by these arguments. While we recognize that preparation of a new statute is a bigger task in terms of scope for the draftsperson than that which was originally envisioned, it may well be one that in the long run proves easier. Ensuring homogeneity of language, in any event, should be less difficult. This should result in legislation that is more transparent and, consequently, of more benefit to those whom it is meant to serve. We recommend, therefore, that the reform proposals contained in this *Report* should be set within the context of a new statute contemporary in language and principle. We believe that the substantive issues upon which we have been asked to comment by the Minister go to the very heart of building lien legislation and that, as a package, the recommendations for change herein set forth lay a sound and rational basis for a new Act.

The Commission recommends:

1. In the present economic atmosphere and in the absence of strong or any evidence warranting same, mechanic lien legislation should not be abolished. However, *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be repealed and replaced by a new statute contemporary in language and incorporating the changes which the Commission proposes. The new Act should be drafted in such a manner as to be accessible to the non-lawyer. It should establish clearly, concisely and precisely the rights of all the parties affected by it.

CHAPTER 2

INTERESTS ENTITLED TO LIEN PROTECTION

1. Introduction

Mechanics' lien legislation is remedial in nature. Its purpose or object is to secure to those entitled to its benefit payment for the provision of work, services or materials; provided, however, that the criteria governing its application have been met. In *Lee* v. *Lincoln Construction et al*,[1] Puddester J. quoted from *Wallace on Mechanics' Liens* in this regard as follows:

> Mechanics' liens upon realty being in derogation of the common law and depending for their existence wholly upon statutes, the courts throughout Canada have given a strict construction to the provisions of Mechanics' Lien Acts, so far as they create the right to a lien, but the courts adopt a liberal construction of the provisions which deal with the enforcement of the lien. These provisions being remedial should be liberally construed, but, so far as the terms creating the right to a lien are concerned, the language of such statutes is strictly construed against the person claiming the lien. Such a lien should be fully enforced when the claimant has brought himself within the provisions of the statute, but its terms should not be extended to cases falling within the provisions of the statute, but not provided for by the language of the statute. The courts cannot extend the statute to meet meritorious cases unprovided for by the statute.[2]

This view was reiterated recently in *Barlow* v. *Tourism and Recreational Enterprises Ltd. et al*[3] and *McLoughlin Supplies Ltd.* v. *Elliston Developments Ltd.*[4] The threshold consideration for the prosecution and defence of any lien claim, therefore, must be whether the provision of the specific work, services, or materials sought to be protected is within the protective scope of the language of the Act.

Section 7(1) is the section in the Newfoundland enactment which allows for the creation of the lien. It provides:

> 7.(1) Unless he signs an express agreement to the contrary, and in that case subject to Section 4, *where any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor, such person has, by virtue of doing such work or placing or furnishing such materials, a lien*

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1 (1973), 4 Nfld. & P.E.I.R. 116 (Nfld. S.C.T.D.). See also *Pollett's Electrical Services Ltd.* v. *The Guarantee Company of North America* (1972), 3 Nfld. & P.E.I.R. 35 (Nfld. S.C.T.D. per Puddester, J.)

2 *Ibid.* at 127.

3 (1988), 72 Nfld. & P.E.I.R. 228 (Nfld. S.C.T.D. per Cameron J.).

4 (1988), 30 C.L.R. 141 at 148 (Nfld. S.C.T.D. per Steele J.).

> *for the price of the work or materials upon the estate or interest of the owner in the land, building, strucutre or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing*, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien. [Emphasis added.]

The test outlined in this provision is essentially one of nexus or relation. The section recites, on its face, a catalogue of activities related to or connected with an improvement which when performed by any person attract lien protection for the price of the work or materials in an amount equal to the sum justly due and owing. In Chapter 2 of the Commission's *Working Paper* a number of recommendations were made concerning the scope and application of this provision. These recommendations were the subject of some comment and might usefully be reviewed.

2. Waiver of Lien Rights

Section 7(1) of *The Mechanics' Lien Act* is introduced by the phrase "[u]nless he signs an express agreement to the contrary, and in that case subject to Section 4. . ." Subsection (1) of section 4 states that any agreement by a workman to avoid application of the Act or the remedies and benefits it provides is null, void and of no effect. Subsection (2) of section 4 exempts from the operation of subsection 4(1) managers, officers, foremen and any person whose wages are more than fifty dollars a day. The net effect of these provisions, given current rates of pay in the construction industry, is to permit contracting out of the rights and remedies which the Act gives by practically everyone; subcontractors, suppliers and wage-earners alike. Section 5 of the Act provides that anyone who is not a party to the agreement waiving the lien is not to be deprived of his rights.

In our *Working Paper* the Commission expressed the view that waivers of lien rights should be prohibited.[5] Our position was based on the premise that only those with weak bargaining power waive their lien rights and that it is this very group that the Act seeks to protect. To allow contracting-out tends to undermine the objectives the legislation was intended to promote.

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5 *Working Paper on The Mechanics' Lien Act: Certain Substantive Issues* 1988 (NLRC-WP3, April 1988) at 18.

This recommendation prompted adverse comment from one respondent who argued in support of lien-waivers as follows:

> Lien Waivers permit flexibility in the interest of Commerce. There is a real danger here that General Contractors in particular would not be allowed to run their businesses as they wish. Sub-contractors and suppliers are quite free to not deal with the general contractors who they believe may be treating them in a high handed manner.[6]

We pointed out in our *Working Paper* that provisions similar to those contained in sections 4, 5 and 7 of the Newfoundland legislation were considered in Ontario's most recent review of its lien statute. It was decided that all contractual waivers of lien rights should be prohibited. The policy reasons underlying this position have been explained as follows:

> One could expect that in situations of unequal bargaining power, especially in a depressed economy where the number of construction starts have diminished, the eagerness for work might have caused a subcontractor to waive his lien rights prospectively.
>
> In recognition of the potential of this situation for abuse, the Legislature saw fit to prohibit lien waivers. Section 4 of the *Construction Lien Act, 1983* now provides: "An agreement by any person who supplies services or materials to an improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void."[7]

McGuinness provides an additional reason for supporting a prohibition of lien waivers based on credit granting practices within the industry.

> [T]he inherent peculiar nature of construction activity requires the provision of extensive credit by suppliers in that industry, as an integral and essential part of the construction process. The provision of such credit creates a need for a means of providing for that credit. Security is needed in order to coerce payment, where a person refuses to pay for the services or materials that have been supplied to him, and also to provide creditors with salvage protection, where that person is unable to pay for the work that has been done for him. *The complexity of contractual relationships in the construction industry make the free negotiation of such protection a practical impossibility in most cases. In addition, even if transaction costs did not present a problem to the industry, it is doubtful whether adequate protection could be obtained under the existing law of contract* (particularly as it relates to the question of third party benefits under a contract), *and the law of trusts* (particularly as it relates to the need for a specific and identifiable trust property). *The remedies provided by the lien Act are intended to fill this void, by*

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6 Seabord Construction Ltd., *Brief on The Working Paper Respecting Mechanics' Liens*, (October 1988) at 3.

7 Kirsh, *Kirsh: A Guide to Construction Liens in Ontario*, 1984 at 31.

> *providing construction suppliers with a kind of protection which it would be impossible for them to obtain through negotiation.* [Emphasis added.][8]

In recent years, Saskatchewan,[9] Manitoba[10] and Alberta[11] have all prohibited agreements purporting to provide for contracting out of the rights and remedies that the Act provides. The Manitoba Law Reform Commission argued that "[W]aivers of lien should no longer be legal and that they [should] be declared null and void and as against public policy."[12]

This Commission remains of the view that an absolute prohibition against waivers of lien rights should be enacted. We believe, for the reasons already indicated, that such a prohibition is consistent with the policy objectives underlying the legislation and will better protect and promote the interests the statute is meant to serve.

The Commission recommends:

2. All waivers of lien rights should be declared void and contrary to public policy.

3. Architects, Engineers and Other Design Consultants

The Commission's *Working Paper on the Mechanics' Lien Act* adopted the tentative view that the lien legislation currently in place in this Province should be amended so as to extend lien protection to engineers, architects and consultants generally who prepare the designs and specifications for improvements.[13] We argued that the extension of lien rights to services of this sort was not inconsistent with the protective intent of the present Act: the land which receives the benefit should also bear the burden. We did, however, propose an exemption from the amended provision in favour of architects as a result of a specific submission from them to this effect. This recommendation, as a whole, prompted a number of adverse comments.

In its Brief in reply, the Department of Public Works and Services wrote as follows:

> At the present time, prime consultant fees are not normally withheld by government-funded bodies for work done. Therefore, prime consultants make no contribution to the 10% holdback fund. A case can be made therefore, as to why they should share that fund by right of lien. Also, many architecturally-owned firms employ engineers and vice-versa; so the two professions, to that extent, are intertwined. The Department feels

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8 McGuinness, *Construction Lien Remedies in Ontario*, 1983 at 118.
9 R.S.S. 1978, C.M-7, s. 11; S.S. 1984-85-86, s. .
10 S.M. 1980-81, c. 7, s. 11.
11 R.S.A. 1980, c. B-12, s. 3.
12 *Manitoba Report*, *supra* Ch. 1., fn. 15, at 85.
13 NLRC-WP3 (April 1988) at 19-24.

> that the ramifications of this recommendation, including the exemptions for architects, needs to be looked at more carefully. If consultants are to be included, then it seems reasonable that all consultants should be included. In that event, there should be a holdback on the consultant's fees. In general, we do not believe there is a strong case to be made for including consultants.[14]

The comments of the Law Reform Committee of South Australia had a similar bottom line:

> [A]rchitects . . . are not considered to be protected under our Act. After all, architects have copyright in their plans and specifications and can by injunction prevent their use or further use if the fees are not paid. Also, if your standard building contract is like the British and Australian standard forms, architects are well protected by the contract, so our feeling is that if with those advantages architects remain unpaid, they need a business manager not a lien.[15]

The rationale for extending lien protection to design consultants is discussed at length in the Commission's *Working Paper*.[16] As regards architects, the case law in this area is to the effect that an architect is entitled to a lien for the costs incurred in the preparation of plans if he supervises the erection of the work or building in accordance with his plans. However, he is not entitled to a lien for drawing plans where the improvement is not proceeded with. The validity of this distinction has been questioned. In our *Working Paper*, we note with approval the following comment of the Law Reform Commission of British Columbia:

> It is hard to see how an architect's services in the form of supervision are any more of a contribution to the improvement than are his services in the form of the drawing of plans. No doubt the provision of supervisory services is closer in time to the actual construction than is the drawing of plans, but this is an artificial basis for distinguishing the two. When once the logic of including supervisory services is perceived, it is hard to resist its extension to other forms of an architect's work in connection with an improvement.[17]

If proximity in time results in arbitrary distinctions and a "value added" criterion provides a more rational test for relation, then, so long as it can be shown that the design, plans, drawings or specifications in themselves enhance the value of the owners interest in the land, it is logically consistent that lien protection be allowed in these cases, quite apart from any consideration of the provision of supervisory services or whether or not the intended construction or improvement proceeds. When the improvement

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14 *Comments on Working Paper by the Newfoundland Law Reform Commission for the Mechanics' Lien Act* (August 1988) at 2.

15 *Comments on Working Paper on the Mechanics' Lien Act: Certain Substantive Issues* (July 1988) at 4-5.

16 NLRC-WP3 (April 1988) at 19-24.

17 *Ibid.* at 20; *The British Columbia Report*, *supra* Ch. 1, fn. 15, at 31.

does not proceed, the test will, of course, be a difficult one to satisfy; however, there is no reason to think that it could never be met. Indeed, *Ambro Materials and Construction Ltd.* v. *230056 Investment Ltd.*[18] deals with just such a situation. In that case, an engineer was held to be entitled to a lien for the preparation of the plans for the sewers, watermains and roads for a planned subdivision. The Court found that even though the planned subdivision was never built, the plans prepared by the engineer could be sold with the land and that they, therefore, added to the value of the land.

The Commission's recommendation was greeted favourably by the Association of Professional Engineers of Newfoundland. In their response to our *Working Paper*, they wrote:

> Please be advised that as a result of a vote of the membership, it has been decided to request the inclusion of engineers under the proposed broadened scope of the Lien legislation. We understand that this will put Newfoundland Engineers in a similar position to their counterparts in Ontario.[19]

The Ontario *Construction Lien Act 1983* defines "supply of services" to mean "any work done or service performed upon or in respect of an improvement, and includes . . . where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner's interest in the land."[20] With respect to architects, special representations resulted in an amendment to the original legislation, the effect of which was to grant a specific exemption in their favour.[21]

The suggestion by the Department of Public Works and Services that if consultants are to be included then equality of treatment is to be preferred is a cogent argument and, if given effect, would no doubt result in legislation that is internally more consistent than our either *Working Paper* recommendation or the provision in the new Ontario legislation as amended. The new Saskatchewan legislation makes no express provision for design consultants. The new Manitoba legislation provides:

> "services" includes
>
> (i) the preparation of specifications, drawings and other documents used or to be used in construction, . . .
>
> but does not include the preparation of specifications, drawings and other documents by, or the administration of a contract or sub-contract by,

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18 (1975) 9 O.R. (2d) 225 (H.C.)
19 *Mechanics' Lien Legislation Review* November 1988 at 1.
20 S.O. 1983, c. 6, s. 1(1)25.
21 R. Walker, "Overview--The Construction Lien Act," at 6 included in *Practical Application of The Construction Lien Act, 1983*, materials prepared for an Insight Seminar held at Toronto on June 11, 1984.

or inspection or supervision of work done under a contract or sub-contract by, a professional architect or engineer who is not an employee of the contractor or subcontractor.[22]

The ostensible effect of this provision is to exclude from lien protection architects and engineers, other than, presumably, those on staff of the contractor and subcontractor, who appear to be entitled to the protection which other design consultants receive under the Act.

The purpose of the lien statute is to provide secured rights against lands for those who perform services or furnish materials for the improvement of that land. This Commission remains of the view that it is entirely consistent with this principle that lien protection should be extended to design consultants generally, so long, of course, as it can be demonstrated that the services provided enhance the value of the owner's interest in the land. Our problem is what to do with architects and engineers; the former profession wants to be without the statute's protective scope so as to avoid the holdback provisions while the latter regards the right to lien as beneficial. Although it would be a relatively easy matter to give each group what is wants, we are concerned that dichotomous treatment might create confusion and spawn litigation. As pointed out in the Brief from the Department of Public Works and Services, many architecturally-owned firms employ engineers and vice-versa. There are a number of cases in point in the immediate St. John's area. The two professions are intertwined; both professions have input when plans, drawings and specifications are prepared, and we are informed that it is often difficult to disentangle where one leaves off and the other begins. After much discussion, we have decided that equality of treatment is the best course and that both professions should be brought within the statute. We believe this position to be the most practicable one; certainly, it is consistent with the princple underlying lien legislation.

The Commission recommends:

3. Lien protection should be extended to those, including architects and engineers, who supply designs plans drawings or specifications that in themselves can be proven to enhance the value of the owner's interest in the land, whether or not the intended construction or improvement proceeds.

4. Residential Home Buyers

Lien legislation grants in the circumstances specified in section 7(1) of the Act secured rights against land, the value of which has been enhanced, to a particular class of creditors; namely, to those whose work, services or materials has improved the land. Are there any competing interests that need

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22 S.M. 1980-81, c. 7, s. 1.

to be taken into account? In our *Working Paper* we suggested that there were and that residential home buyers constituted just such a group.

Section 16(1) of *The Mechanics' Lien Act* states:

> 16.(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

It is settled that a purchaser who pays his purchase price and registers his deed or transfer after receiving notice in writing of a lien, or after the registration on title of a claim for lien will lose priority as regards such liens. As was said in *C.M.H.C. v. Wood*, "[r]egistration of his lien first allows the lien claimant to establish his priority over subsequent purchasers or mortgagees."[23] It does not necessarily follow, however, that in the converse situation, i.e. a purchaser who has paid his purchase money and registered his deed prior to receiving written notice of a lien or prior to registration on title of a claim for lien, will take clear of the lien. The matter is complicated because in some circumstances a purchaser may be regarded as an "owner."[24]

Section 2(1)(i) of *The Mechanics' Lien Act* defines "owner" as follows:

> S. 2(1)(i) "owner" includes any person having any estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and
>
> (i) upon whose credit,
>
> (ii) on whose behalf,
>
> (iii) with whose privity or consent, or
>
> (iv) for those direct benefit
>
> work is done or materials are placed or furnished and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials placed or furnished have been commenced to be placed or furnished;

A contract for the sale and purchase of property that is capable of specific performance creates an equitable interest in the land in the purchaser before completion. Where, therefore, it can also be said that work done on the

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23 (1967) 53 M.P.R. 294 at 298 (Nfld. T.D., per Puddester J.).

24 See *Trustee of Watt Milling Co.* v. *Jackson* [1951] O.W.N. 891 (H.C.); *Reggin* v. *Manes* (1892), 22 O.R. 443 (Ch. Div.); see also *Kelly* v. *Progressive Builders Ltd.* (1970) 1 Nfld. & P.E.I.R. (Nfld. T.D., per Puddester J.).

property, at the request of the purchaser, is done either for his direct benefit, upon his credit, on his behalf or with his privity or consent, he will be regarded as an owner.

Purchasers falling within the statutory definition of owner are subject to the full force of the legislation. Like other "owners" they must holdback the required amount for the requisite period in default of which they may be liable to pay again to lien claimants the amount of the holdback. We noted in our *Working Paper* that the purchaser's exposure to potential liability in these situations has been the source of some concern. Some builders today construct a number of model homes and arrange sales on the basis of the purchaser agreeing to buy a particular lot on which the builder is to construct a house according to one of the models. We suggested that in these situations purchasers should not be required to maintain holdbacks and should be suitably protected. We proposed that this could be achieved, as in Ontario's *Construction Lien Act 1983*, by excluding residential home buyers from the definition of "owner" contained in the Act.[25]

This recommendation occasioned considerable concern on the part of supply dealers. The submission on behalf of the Atlantic Building Supply Dealers Association, who responded as follows, is typical:

> On page 36 of the *Working Paper*, the Commission recommends that residential home buyers be excluded from the definition of "owner" in the Act. They would therefore be exempt from the holdback requirements otherwise applicable under the legislation. This suggestion is of grave concern to the members of the [Atlantic Building Supply Dealers Association].
>
> Many of the members of the Atlantic Building Supply Dealers Association are small businesses, in the literal sense of that phrase, and most are owner operated. Purchasers for residential construction are their bread and butter. While excluding residential house buyers from the Act may have a small impact on the construction industry as a whole, one or two jobs gone awry can have a devastating effect on a building supply dealer, considering the low margins in the business. On the other hand, very few, if any, buyers of newly constructed houses do not have legal representation. Therefore, these buyers can be readily protected upon receipt of proper legal advice. As a result, the Commission's commendable goal of protecting the consumer here may be accomplished at an unacceptable price to the building supply dealers. Therefore, ABSDA respectfully requests that the Commission reconsider its recommendation in this regard.[26]

The Newfoundland and Labrador Construction Association made much the same point:

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25 *Construction Lien Act, 1983*, S.O. 1983, c. 6, ss. 1(1)7a, 7b, and 15.
26 *Brief respecting Working Paper on The Mechanics' Lien Act*, (October 1988) at 3-4.

> At page 36 of the *Working Paper*, it is recommended that "residential home buyers . . . should be exempt from the holdback requirements otherwise applicable under the legislation." The [Newfoundland and Labrador Construction] Association objects to this exemption, as it would deprive subcontractors in the homebuilding industry of the protections that are available in all other segments of the construction industry. Such subcontractors would, at best, be forced to play a "cat and mouse" game with general contractors, having to file their liens almost as soon as they lay down their tools, out of fear that the house might be conveyed at any time. Given that almost all residential home buyers avail themselves of Legal Counsel, and that mechanisms for holdback are already in place, there is no justification for this exemption.[27]

The decision to exempt residential home buyers from the holdback provisions otherwise applicable under the legislation was grounded in a policy determination. Because the growing trend towards customization in the residential home-building market has increased the likelihood of purchasers falling within the statutory definition of "owner" as provided by the Act, we argued in our *Working Paper* that special measures were warranted to protect the home-buying consumer and to ensure the continued vitality of this sector of the construction industry. We take the position that these interests continue to warrant protection and that they are not out-weighed by the concerns expressed by suppliers. The interests which we are attempting to protect might usefully be restated.

First, where the home purchaser is characterized as an "owner," payments made in respect of the purchase price will not have the effect of discharging outstanding liens. This leaves the purchaser open to potential double liability. In a market where there is a high demand for housing, the builder-vendor can refuse to close a transaction where he has not been paid in full. We noted in our *Working Paper* that a purchaser with his moving van loaded and waiting to take possession has little bargaining power. He has no real alternative but to pay the full purchase price and accept the risk. Further, we pointed to evidence that this is so notwithstanding attempts by solicitors as early as twenty years ago to protect the interest of their purchaser-clients by insisting on a holdback until the expiry of the lien period.[28]

Second, where purchasers cannot be sure that moneys paid to the vendor at closing will discharge all liens, there is a likelihood that purchasers will eventually refuse to buy. This kind of development would have an adverse effect on the residential home construction sector, and is not in the interest of the industry or of society at large. Statutory assurance that home-buyers

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27 Brief of the NLCA Respecting *The Working Paper on The Mechanics' Lien Act: Certain Substantive Issues*, (October 1988) at 1.

28 N. L. Carnworth, "Amendments to the Construction Lien Act, 1983," 2 C.L.R. 274 at 275.

will not be exposed to potential double liability should encourage sales and, consequently, cash flow. It has been said ". . . that the best way of ensuring payment in construction of the house-building variety is to facilitate sale rather than to secure liens as an interest in the premises."[29]

It should be noted that, as in Ontario, the proposed exemption in favour of those who buy a home would not extend to those who have a house built. Nor would it extend to home improvements such as renovations. The Ontario definition of "home-buyer" also requires that not more than 30 percent of the purchase price be paid prior to the conveyance and that the home not be conveyed until it is ready for occupancy, evidenced by the issuance of a municipal permit authorizing occupancy or the issuance under the *Ontario New Home Warranties Plan Act*[30] of a certificate of completion and possession. Kirsh explains these requirements as follows:

> The definition of "home buyer" is intended to encompass purchasers whose intention is to buy a home and not to have one built. The total deposits a "home buyer" may make is limited to [30] per cent. This is a somewhat arbitrary figure, but reflects the fact that, where deposits are greater than this amount, the purchaser is financing construction. It also is designed to protect suppliers of services and materials by ensuring that there is a significant amount at stake at closing to deal with liens that are registered. The definition requires the conveyance of both the land and home only after the home is ready for occupancy. This will prevent avoidance of the Act and permit those working on the home site to know when they may lose their lien rights. Those who have left the site will be able to demand relevant information. [See section 39(1)3 of the *Construction Lien Act 1983*.] One of two different forms of documentation are (*sic*) required to evidence the readiness for occupancy of new homes. This will provide certainty to all parties to the conveyance.[31]

"Right to information" provisions similar to those contained in the Ontario section 39(1)3 might usefully be included in the proposed new legislation for this province. This would eliminate the "cat and mouse" game between contractors and subcontractors adverted to in the Newfoundland and Labrador Construction Association Brief.

Those who oppose the suggested amendment appear to have lost sight of the new trust protection recommended. In Chapter V of our *Working Paper*, the Commission recommended the adoption of a trust provision similar to section 9 of Ontario's *Construction Lien Act, 1983*.

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29 McGuinness *supra* n.8 at 190.
30 R.S.O. 1980, c. 350.
31 Kirsh, *Kirsh: A Guide to Construction Liens in Ontario*, 1984, at 13.

That section provides:

> 9. (1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> (a) the value of the consideration received by the owner as a result of the sale,
> less
> (b)the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
>
> constitutes a trust fund for the benefit of the contractor.
>
> (2) The former owner is the trustee of the trust created by subsection (1), and he shall not appropriate or convert any part of the trust property to his own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to him related to the improvement.

In its *Report* on the *Construction Lien Act, 1983*, the Attorney General's Advisory Committee explains this provision as follows:

> [Section 9] is designed to prevent the circumvention of lien claims through the sale of the property by the original owner prior to expiry of lien rights. Under the current law, persons with unregistered liens usually have no rights against land after it is sold, because only rarely will the purchaser be an "owner" of the premises within the meaning of the Act. As a general rule, it would be unfair to attach liability to an innocent purchaser of a new home.
>
> The section corrects the problem by providing that the consideration received by the vendor from the sale constitutes a trust property. All liens that would have been enforceable against the property, prior to the sale, continue as a charge against this trust property. The obligations of the former owner, as trustee of the trust property, are set out in subsection 2. This provision should be of particular use in the case of residential subdivision construction.[32]

Section 8(1) of the Ontario Act states that all moneys owed to or received by a contractor or subcontractor on account of the contract or sub-contract price constitute a trust fund for the benefit of the subcontractors or other persons who have supplied services or materials to the improvement. Section 8(2) provides that the contractor or subcontractor is the trustee of the fund created by sub-section (1) and that he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by him. Taken together, sections 8 and 9 of the Ontario Act, both of which it is recommended should be included in the new Newfoundland statute, provide subcontractors and suppliers with trust protection notwithstanding

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32 *Supra* Ch. 1, n. 15, at 39-40.

that the sale of the improvement may be characterized as a residential home purchase/sale and that the home-buyer is exempt from the holdback requirements otherwise applicable.

The balance sought between the interests of consumers and supply dealers is one that should address the valid concerns of both groups and at the same time facilitate sales and the continued growth of the residential home construction industry. It is our view that, as a package, the recommendations contained in the Commission's *Working Paper*, achieve this balance. We are not persuaded by the representations received to the contrary. We confirm our original recommendation.

The Commission recommends:

4. Residential home buyers should be expressly excluded from the definition of "owner" contained in section 2(1)(i) of *The Mechanics' Lien Act*, R.S.N. 1970, c.229; they should be exempt from the holdback requirements otherwise applicable under the legislation. Suppliers should be protected by new Trust provisions.

5. Workers' Compensation Lien

During the hearing process prior to preparation of our *Working Paper*, the Commission received one Brief requesting that s. 110(2) of *The Workers' Compensation Act, 1983*, S.N. 1983, c. 48, be amended so as to ensure that the rights given under *The Mechanics' Lien Act* are not subverted or jeopardized by the lien for assessment created under *The Workers' Compensation Act, 1983*.[33] Section 110(2) of *The Workers' Compensation Act, 1983* provides:

> The amount of any assessment, is a first lien upon all property of the person to whom the assessment is charged, . . . whether or not that property is used in or in connection with or produced by or in the industry in respect to which the employer is assessed.

The purpose of this provision is to enable the Workers' Compensation Commission to maintain an adequate injury fund by ensuring payment to the Commission of assessments due it. This is achieved by constituting the amount of such assessments ". . . a first lien upon all property of the person to whom the assessment is charged. . ." It was suggested that in the event of insolvency of either the owner or the general contractor this provision might work hardship. Two scenarios were sketched:

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33 *Second Supplemental Report of the Special Committee of the Law Society of Newfoundland with Respect to the Mechanics' Lien Act* (December 1985) at 1-4.

Scenario 1:

The owner of a building becomes insolvent during its construction. The owner has retained a 10% holdback from the general contractor and therefore substantial holdback funds are in the hands of the owner. The general contractor and sub-contractors have paid their workmen. If, pursuant to section 110(2), the holdback is regarded as property of the owner, the general contractor might not be entitled to be paid for the 10% of the work which he has performed and which is reflected in the value of the building.

Scenario 2:

The general contractor goes insolvent during the course of completing a building. There is a substantial holdback in the hand of the owner. As before, the building has been constructed, in part, through the efforts of the sub-contractors. If the holdback is considered to be a sum due to the general contractor, section 110(2) potentially means that the Workers' Compensation Commission has priority over the holdback for its assessment against the general contractor.

It was argued that, in both these situations, the holdback should be protected for the benefit of the general contractor and/or the sub-trades, since it represents money which they have, in effect, already earned. They should be entitled to be paid from it in priority to other claims for the value of the work that they have contributed to the improvement. The matter should be placed beyond doubt, it was suggested, by expressly providing by way of an amendment to section 110(2) of *The Workers' Compensation Act, 1983* that for purposes of that section, the holdback is not property of the person to whom the assessment is charged.

In our *Working Paper* the Commission took the position that, though we were in agreement with the premise underlying this argument (namely, that funds generated as a result of activity within the construction pyramid should go, in the first instance, to satisfy claims arising therein), we were not persuaded that an amendment to section 110(2) of *The Workers' Compensation Act, 1983* was necessary.[34] We adopted this view for two reasons.

First, we pointed out that the Commission's recommendation for the inclusion within the proposed new Act of trust provisions was intended to address in a global way the kind of problem that had been identified. The express purpose of the new comprehensive trust remedy would be to ensure that those who enhance the value of an improvement through the provision of work services or materials have priority over other claims to the contract money in respect of the improvement in the hands of the owner, contractor or subcontractor. Second, we noted that where the issue outlined in the two scenarios had been litigated (we were able to find case law only in respect

34 NLRC-WP3 (April 1988) at 24-30.

of scenario 2 above) Courts have, as a matter of fact, interpreted the interaction of the respective provisions of both pieces of legislation in such a manner as to give priority to mechanics' lien claimants over the Workers' Compensation lien for outstanding assessments. For example, in *Hudson's Bay Oil and Gas Company* v. *Trustee in Bankruptcy of F.P.C. Construction Ltd. et al.*[35] the Supreme Court of Alberta, Trial Division, was called upon to adjudicate the effect of section 77, subsections (4) and (5) of *The Workmen's Compensation Act*, R.S.A. 1955, c. 370,[36] the counterpart of this Province's section 110(2). The applicant, on whose property work had been done and materials supplied by a number of subcontractors who had filed liens, paid into Court the holdback owing to the general contractor, who had since gone bankrupt. The Workmen's Compensation Board, relying upon the statutory provision, claimed that it was entitled to be paid the amount of its assessment against the bankrupt contractor in priority to lienholders claiming under the contractor, even though the lienholders' claims were prior in time to the Board's claim. The Board argued that the money in Court was "property of the employer" within the meaning of the Act. The Court held that the money paid into Court was money realized by proceedings under *The Mechanics' Lien Act* and was to be applied and distributed in accordance with the order set out in that Act. It never became property of the contractor within the meaning of the relevant section of *The Workmen's Compensation Act*[37]. We noted that a similar result was reached in the Supreme Court of this Province in *Re Hallmark Construction Ltd.*,[38] though the ratio of that decision is admittedly less clear.

The Commission continues to be of the view that an amendment to section 110(2) of *The Workers' Compensation Act, 1983* expressly providing that for purposes of that section the holdback is not property in the relevant sense is unnecessary. We received no adverse comment on this recommendation as set forth in our *Working Paper*. We confirm our original recommendation.

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35 (1969), 67 W.W.R. 665 (Alta. T.D., per Sinclair J.).

36 The sections read:

77. (4) Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this Act or in respect of any amount that the employer is required to pay to the Board under any of the provisions of this Act or upon any judgment for such assessment or amount, is a charge upon the property of the employer, including moneys payable to, for, or on account of the employer, within the Province.

77. (5) Such charge has priority over all debts, liens, charges, mortgages or other encumbrances whatsoever, whenever created, except wages due to employees by their employer or employers in cases where the exercise of the priority would deprive the claimant therefor of such wages.

37 See also: *Shoquist Construction Company* v. *Norfold and Retailers Trust and Savings et al.*, [1974] 5 W.W.R. 513 (Sask. Q.B.); *Union Electric Supply Co.* v. *Gillin Engineering and Construction Ltd. et al.* [1971] 3 O.R. 125 (Ont. H.C.).

38 (1978), 19 Nfld. & P.E.I.R. 165 (Nfld. S.C. T.D. per Noel J.).

The Commission recommends:

5. It is not necessary that Section 110(2) of *The Workers' Compensation Act, 1983* be amended to expressly provide that, for purposes of that section, the holdback is not property of the person to whom the assessment is charged.

CHAPTER 3

THE HOLDBACK

1. Introduction

The pivotal remedy available under mechanics' *lien* legislation is the lien granting secured rights against the owner's interest in land to those who have enhanced the value of the land through the provision of work, services or materials. Section 7(1) of the Newfoundland enactment states that where any person performs work or places or furnishes materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing any of the projects enumerated for an owner, contractor or subcontractor, that person has by virtue of such action a lien upon the estate or interest of the owner in the land in the amount of the sum justly due and owing to him.

In addition to ultimate security against the land, however, the legislatures in all Canadian jurisdictions have sought to ensure payment of lienholders' claims by requiring retention out of disbursements made under building contracts of a percentage (generally based on the total contract price) of the value of the particular work done at the time payments are made. This retained percentage is referred to as the mechanics' lien ***holdback***. Subsection 13(1) of this Province's statute stipulates as follows:

> Subject to the other provisions of this section, in all cases, the person primarily liable upon any contract under and by virtue of which a lien may arise shall, as the work is done or the materials are furnished under the contract, retain for a period of thirty days after the completion or abandonment of the work done or to be done under the contract ten per centum of the value of the work and materials actually done, placed or furnished, as referred to in section 7, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated, upon evidence given in that regard, on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work or materials.

What this provision contemplates is that at each level of the construction pyramid ten percent of the value of the work or materials actually provided will be retained for a specified period of time. Thus, if an owner makes periodic progress payments to his general contractor, the owner is obliged to withhold ten percent of such payments as "holdback." In like fashion, the contractor must retain ten percent of the amount owing to each of his subcontractors; each subcontractor must retain ten percent from each of his subcontractors and so on down the line. The purpose to be served by this procedure is essentially one of security. The mechanism was developed in order to safeguard the financial interests of those who have worked on or who have supplied materials to a project, thereby enhancing its value, but who in the absence of contractual privity with the owner have no direct claim

against him. In addition, as Macklem and Bristow point out, the system "...was designed, while giving such security, to allow the owner to pay over money to the contractor and to allow the latter to get on with his job."[1]

Though conceptually separate creatures, the lien and holdback work together hand in glove and, in a sense, are but two aspects of one overall remedy: "The holdback and the lien are separate remedies; but if the Act is to work well, they should complement each other."[2] Subsection 13(5) of the Newfoundland legislation provides that all liens are a charge upon the holdback. Payments made in accordance with the holdback and the other payment regulating provisions of the Act operate as a discharge of the lien.[3] The holdback is a reserve fund out of which lien holders claims may be satisfied. Where the holdback is retained and paid out in compliance with the statute, the lienholder has no further right to the land and will be unable to obtain a judicially ordered sale. A properly maintained holdback keeps an owner safe from liability. Failure to comply strictly with the payment and holdback requirements, however, places the land in jeopardy.

From the perspective of a subcontractor's supplier, the holdback may usefully be regarded as a kind of credit-insurance. McGuinness states in this regard as follows:

> Essentially, the holdback provisions of the Act comfort suppliers with the knowledge that so long as their liens subsist, there will continue to be a residual fund against which their lien claims may be realized if they do not get paid. In this way the holdback constitutes a form of credit insurance. It is a fund to which a supplier may look for payment in the event that he is not paid. Even when all other contract monies have been paid, the holdback may not be paid until such times as all liens that may be claimed against the holdback have been satisfied, discharged or provided for [by payment into Court].[4]

Retention of the 10 per cent statutory holdback is mandatory. Pursuant to subsection 13(8) of this Province's legislation, the provisions of the statute are incorporated as a matter of course into every contract. Where the Act is complied with, the fund so constituted takes the place of the land and represents the maximum amount for which an owner can be held liable in respect of lien holders' claims.[5]

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1 Macklem and Bristow, *Construction and Mechanics' Liens in Canada*,(1985, 5th ed.), at 149. See also Kirsh, *Kirsh: A Guide to Construction Liens in Ontario*, 1984, at 45. The cases most often cited as to the purpose of the "holdback" are *Len Ariss and Co.* v. *Peloso*, [1958] O.R. 643 (C.A.) and *Torrance* v. *Cratchley* (1900), 31 O.R. 546 (C.A.).

2 *McLoughlan Supplies Ltd.* v. *Elliston Developments Ltd.*, (No. 2), 30 C.L.R. 1 at 4 (Nfld. S.C.T.D. per Cameron J.).

3 *The Mechanics' Lien Act*, R.S.N. 1970, c. 229 ss. 13(1), 13(3), 13(4), 13(6) and 13(7).

4 McGuinness, *Construction Lien Remedies in Ontario*, (1983) at 237.

5 Subsection 13(6) limits the extent of the lien.

2. Should the Holdback Remedy be Retained?

The Commission received two submissions in response to its *Working Paper* which suggested that the holdback remedy should be eliminated. The Law Reform Committee of South Australia wrote as follows:

> We [South Australia] have deliberately rejected holdback. Our profession has considered it at least three . . . and has rejected the concept each time. The basic objections are that holdback is (a) a hardship and (b) not cost effective. We would agree with the ideas expressed in the Newfoundland and Labrador Hydro brief summarized at . . . p. 75 [of your *Working Paper*]. We have had no real problems by not having holdback provisions in our Act.[6]

Seabord Construction suggested that the mechanism of cash holdbacks be replaced with an improved system of bonding.

> Why not utilize paper instead of money? Any insurance companies presently providing construction bonds or perhaps Banks, would be glad to provide labour and material bonds, or payment bonds, or whatever is necessary to provide the protection which is presently given by cash. This would allow the money to flow to the rightful owners, would stop the owners of the project misusing the funds with respect to unnecessary holdback, and would continue to protect the parties involved.[7]

The theme common to both of these submissions is that the holdback mechanism is an ineffective means of achieving the protective ends which mechanics' lien legislation attempts to serve.

The lien law in many American jurisdictions does not provide for retention of a holdback. The keynote address delivered at the 1987 annual convention of the Newfoundland and Labrador Construction Association confirmed this:

> [T]he holdback has practically been eliminated in the United States because construction associations convinced owners that their jobs would cost less if it were eliminated.
>
> A survey of 1,900 subcontractors in 1974 indicated they were carrying an average of $200,000 of holdback on their books. In the same survey, they indicated they could reduce their prices by an average of 3.2 percent if the holdback was eliminated.
>
> Subsequently, the U.S. government eliminated the holdback from all its projects because the prices would be lower without it. Many U.S. architects have also agreed to limit the holdback, or eliminate it, because they were convinced the contractor would complete the project early if there were no holdback. . .[8]

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6 *Comments on Working Paper on the Mechanics' Lien Act: Certain Substantive Issues* (July 1988).
7 Seabord Construction Ltd., *Brief on the Working Paper Respecting Mechanics' Liens* (October 1988), at 3.
8 See *Daily Commercial News and Construction Record*, vol. 60, no. 21, February 2, 1987, at 1.

Interest has recently been expressed in some Canadian jurisdictions in adopting an American model. A joint Government-Industry Task Force on Builders' Liens in the province of Alberta, for example, has proposed that the statutory holdback be eliminated. The claim is that undue reliance upon the holdback, ". . . especially in the residential and small commercial building sectors . . . leads to poor business practices. Proper credit checks and formal contractual relationships are often overlooked because contractors and subcontractors believe that the *Builders' Lien Act* constitutes adequate protection for them. Elimination of the statutory holdback in the view of the Task Force, should encourage better business practice."[9] The Report goes on to suggest, however, that a practice of requiring contractual holdbacks might arise:

> With the elimination of the statutory holdback, it is expected that owners will contractually insist on a holdback. It is highly likely, therefore, that funds will remain in the owner's hands, even after most subcontractors complete their work. Such funds would be caught by a validly registered lien . . . However, once the owner, in good faith, has paid the contractor the full amount owing, the lien will attach to nothing.[10]

The specific model to which the Alberta Task Force makes reference is the lien law of the State of California, though it is pointed out, if somewhat laconically, that wholesale adoption of the California model is not proposed.

The obvious conclusion to be drawn from all of this is that the statutory holdback mechanism as presently conceived is regarded in some quarters as unsatisfactory. It has many weaknesses. But should it be discarded? The predominant view from those who made submissions to this Commission, in particular sub-contractors and suppliers, was that it should not. It was pointed out time and again that in the event of financial difficulty on a project the holdback moneys often constitute the only funds available to satisfy outstanding claims. The legislated universality of the protection was regarded as a real strength. Holdback protection is not something that needs to be negotiated for, with the result that there are no transaction costs incurred in bargaining for it.[11] The protection provided applies throughout the pyramid and to every contract since the relevant provisions of the statute

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9 *Builders' Liens: Towards Greater Assurance of Payment*, Alberta 1988 at 22. Preliminary Report of the Joint Government/Industry Task Force on Builders' Liens.

10 *Ibid.*

11 *Supra* n. 4 at 239. See also *supra* Ch. 2, Section 2, "Waiver of Lien Rights."

are deemed to be incorporated as a matter of course into every contract.[12] The chief concerns amongst those who made representations to us were directed, not so much towards eliminating the holdback but rather, towards making the present system work better. This was especially so as regards release of the holdback and facilitating the expeditious flow of contract funds throughout the various tiers of the construction pyramid.

Nor was there wide support for the bonding option as put forward in the submission from Seabord Construction. The legal profession, in particular, was sceptical as to the adequacy and/or efficiency of this alternative.[13] Present experience indicates that bonding often results in lengthy and unsatisfactory litigation. Moreover, it was pointed out that it was not financially feasible to have each and every minor construction job bonded with a labour and materials payment bond and that such a mandatory requirement could pose a serious impediment to the business of small contractors. Permissive or discretionary bonding should continue to be entertained as a supplement to the existing scheme, but not as a complete and statutorily imposed alternative to it.

It is admitted that elimination of the statutory holdback might well result in legislation that is less complex than the present Act. Before taking this step, however, the Commission believes, in keeping with the majority view put before us, that an attempt should first be made to improve the existing regime. Should it be found after a reasonable trial period that more radical reform is necessary, further consideration might be given at that time to the elimination option. Our views in this regard are reinforced by the fact that, as an approach, improvement rather than elimination is the preferred choice of the majority of reform efforts across the country.

The Commission recommends:

6. The holdback remedy should not be eliminated. However, its efficiency should be improved to expedite the flow of contract moneys throughout the construction pyramid.

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12 See *supra* section 1 of this Chapter at 28-29.

13 *Supplemental Report of the Special Committee of the Law Society of Newfoundland with Respect to the Mechanics' Lien Act*, January 1985. It is interesting that in its *Working Paper on Mechanics' Lien Law in the North West Territories* (1988), the North West Territory Law Reform Commission suggested a hybrid system: the rate of holdback would continue to be 10%, unless there was a material and labour payment bond in place, in which event this holdback should be 5%. This tentative recommendation was withdrawn in the final Report as a result of concern expressed by experienced members of the local Bar. The final recommendation was to the effect that the holdback required should in all cases remain at 10%. North West Territory Committee on Law Reform, *Mechanics' Lien Law in the North West Territory* (1989) at 12.

3. Rate of Holdback

We pointed out in our *Working Paper* that the received view has been that the holdback rate is tied to profit margins within the industry. The *Discussion Paper on the Draft Construction Lien Act* prepared by the Ontario Ministry of the Attorney General stated as follows:

> Traditionally, the holdback rate has been set at the prevailing margin of profit within the construction industry. Where the holdback relates to the profit, the contractor and subcontractor receive enough payment to satisfy their obligations to those who supply services or materials under agreement with them. The current rate of profit in the construction industry is no longer near 15 percent. It now runs closer to 5 percent.[14]

The principle articulated in this statement has been questioned. McGuinness notes that "[w]hile no exhaustive inquiry has ever been undertaken to determine whether this was the case in the late 19th century, when the holdback was first established, it was certainly not the case in 1970, when the present rate of holdback was fixed."[15] He argues, by comparison, that the holdback and lien are remedies tailored to the generic needs of the setting in which they operate.

> "[T]hese remedies are justified by the peculiar inability of the construction industry to protect itself from failures or refusals to pay for the services or materials that are supplied in the course of making an improvement. The holdback plays a crucial role in providing security to the industry (in the way of an opportunity for salvage) since it provides a residual fund against which lien claims may be made."[16]

Whether referable to profit margins or not, it is generally agreed that if the holdback is to serve any purpose, the rate must be set at sufficiently high a level to ensure that the amount of the reserve fund is great enough to make it worthwhile for lienholders to pursue their claims against it by legal avenues.

The percentages of holdback required to be retained in common law jurisdictions across Canada may be summarized as follows:

1. Alberta: *Builders Lien Act*, R.S.A. 1980, c. B-12, ss. 15, 16, 18; 15 percent of the value of the work actually done.
2. British Columbia: *Builders Lien Act*, R.S.B.C. 1979, c. 40, s. 20; 10 percent of the value of the work actually done.
3. Manitoba: *The Builders' Lien Act*, S.M. 1981, c. B91, s. 24; 7.5 percent of the value of the work actually done.
4. New Brunswick: *The Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6, s. 12; 20 percent of the value of the work done, or 15 percent if the value of the

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14 *Discussion Paper on the Draft Construction Lien Act*, Ministry of the Attorney General (November 1980) at 10.
15 McGuinness, *supra* n. 4 at 243.
16 *Ibid.* at 247.

contract exceeds $15,000.

5. Newfoundland: *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, s. 13; 10 percent of the value of the work actually done.

6. Nova Scotia: *The Mechanics' Lien Act*, R.S.N.S. 1967, c. 178, s. 12; 10 percent of the value of the work actually done.

7. Ontario: *The Construction Lien Act, 1983*, S.O. 1983, c. 6, s. 22; 10 percent of the price of the services or materials as they are actually supplied.

8. Prince Edward Island: *The Mechanics' Lien Act*, R.S.P.E.I. 1974, c. M-7, s. 15; 20 percent of the value of the work done, or 15 percent if the value exceeds $15,000.

9. Saskatchewan: *The Builders Lien Act*, S.S. 1984-85-86, c. B-7.1, ss. 34, 43, 45; 10 percent of the greater of the value of the services or materials as they are actually provided or the amount of any payment made on account of the contract or subcontract.

For ease of reference this information may be presented in a table as follows:

HOLDBACK RATE

Province	Rate of Holdback
Alberta	15%
British Columbia	10%
Manitoba	7.5%
New Brunswick	20% up to $15,000 15% over $15,000
Newfoundland	10%
Nova Scotia	10%
Ontario	10%
Prince Edward Island	20% up to $15,000 15% over $15,000
Saskatchewan	10%

The trend across Canada appears to be towards lower rates. For example, until 1970 lien legislation in Ontario required a holdback of 20 percent of the first $25,000 of the contract price and 15 percent of the balance.[17] In 1970, the rate was pegged at a flat 15 percent.[18] In 1983, as a result of representations received from industry, the rate was lowered still further to 10 percent.[19] Similar movement has been evidenced in Manitoba,[20] Nova Scotia[21] and Saskatchewan.[22] In these jurisdictions split levels of 20 percent and 15 percent, depending upon the dollar value of the contract, have been eliminated in favour of a single lower flat rate of either 7.5 percent[23] or 10 percent[24]. In Newfoundland section 7 of *The Mechanics' Lien Act* of 1890 required that the owner retain "...ten per centum of the price to be paid to the contractor."[25] Section 13 of the legislation currently in place in this Province continues to require a holdback of 10 percent.

If one accepts the premise that delays in receiving funds increase construction costs, it appears to follow that a reduction in the holdback rate would result in a reduction in construction cost. We pointed out in our *Working Paper* that, despite this argument, the representations received during the course of our study were for the most part against any upward or downward alteration of the present rate applicable in this Province. The Newfoundland and Labrador Construction Association noted the necessity of balancing the interests of the protection of sub-trades people on the job with the interest of having contract moneys free to pay for the work when completed, or as soon thereafter as possible, and strongly recommended that the holdback rate of 10 percent remain as is. The Special Committee of The Law Society of Newfoundland with respect to *The Mechanics' Lien Act* echoed these remarks. The Committee argued that while increasing the holdback might provide additional protection to subcontractors, the additional limitation on cash flow to the general contractor, and by inference throughout the pyramid, would not be cost effective. The view was taken that the *status quo* should be retained; holdback requirements should not be changed from their present rate of 10 percent. Virtually all submissions received noted that 10 percent is the rate currently favoured in the majority of reform jurisdictions, viz. British Columbia,[26] Nova Scotia,[27] Ontario,[28]

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17 R.S.O. 1960, c. 233, s. 11(1),(2).
18 R.S.O. 1970, c. 257, s. 11(1).
19 S.O. 1983, c. 6, s. 22.
20 *Manitoba Report* at 46f.
21 *Mechanics' Lien Act*, R.S.N.S. 1967, c. 178 s. 12; S.N.S. 1981, c. 33 s. 2.
22 *Saskatchewan Report* at 116f.
23 S.M. 1981, c. B91, s. 24.
24 S.S. 1984-85-86, c. B-7.1, s. 34; also *supra* n. 13.
25 53 Vict. c. 18.
26 R.S.B.C. 1979, c. 40, s. 20.
27 R.S.N.S. 1967, c. 178, s. 12.
28 S.O. 1983, c. 6, s. 22.

and Saskatchewan.[29] The Commission recommended in its *Working Paper* that the 10 percent holdback rate should remain pegged at the present level.

We continue to hold this view. We note, however, some objection to the *Working Paper* proposal. The strongest opposing view came from Seabord Construction. In its Brief in reply it stated as follows:

> For your information, the profit for general contractors in Newfoundland in the past few years has been a lot closer to 0 percent than it has been to 10 percent and I firmly believe that cash holdback, if necessary should be absolutely no more than the 5 percent currently held by the Federal Government on their projects. However, a much closer study should be made of the American system where apparently no state except one has a 10 percent holdback.

There can be no doubt that this view, which follows present reform efforts in Alberta, is out of step with the industry wide consensus in this jurisdiction. The majority view in this Province continues to favour a 10 percent retention rate. It reasons that a decrease in the rate would lessen the protection given sub-contractors and material suppliers and would effectively subvert the purpose served by the residual fund which the holdback constitutes. In light of the broad based support which the 10 percent retention rate attracted and the numerous representations we received in this regard, we continue to believe that a change in the current rate is not warranted at this time.

The Commission recommends:

7. The 10 percent holdback currently required by Section 13 of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should remain as pegged at its present level.

4. Release of the Holdback: Substantial Performance

(a) The Problem

(i) The *Working Paper* Analysis

In our *Working Paper*, we indicated that the focus of much of the dissatisfaction with the operation of the present legislation was on the doctrine of substantial performance.[30] The notion of substantial performance was introduced into the lien legislation of this Province with the revised Act of 1970.[31] The purpose of the provision was to expedite the flow

29 S.S. 1984-85-86, c. 13-7.1, s. 34; see also *supra* n. 22.
30 NLRC-WP3 (April 1988) at 45f.
31 *Supra* Ch. 1 at 3.

of project funds throughout the construction chain by facilitating the early release of holdback moneys. In *County of Lambton* v. *Canadian Comstock Ltd.*, the Supreme Court of Canada held that completion of the contract meant actual and final completion of all work on the project even to the smallest detail.[32] The inevitable result of this reading was to delay inordinately the downward flow of funds; the cautious owner would be reluctant to pay over holdback moneys in his hands until he was assured that all work had been totally completed. The intention of the substantial performance amendment was to alleviate this difficulty. Completion of the contract was defined to mean substantial performance, not necessarily total performance, of the contract.[33] Substantial performance was deemed to have occurred when specific criteria regarding use and a percentage dollar value of the work remaining to be done had been satisfied.

Subsection 2(2) and 2(3) of the Act, as amended, provided as follows:

s.2(2) For the purposes of this Act, a contract shall be deemed to be substantially performed

(a) when the work or a substantial part thereof is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than

(i) three per centum of the first two hundred and fifty thousand dollars of the contract price,

(ii) two per centum of the next two hundred and fifty thousand dollars of the contract price, and

(iii) one per centum of the balance of the contract price.

(3) For the purposes of this Act, where the work or a substantial part thereof is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

Though these provisions appeared simple and straightforward, subsequent history has proved that such is not the case.

In our *Working Paper* we identified three difficulties of a definitional and practical nature with these provisions. First, the concept is not consistently incorporated into the Act with the result that there is a very real

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32 [1960] S.C.R. 86. At pp. 93-94 of his judgment Judson J. said:
Completion means what it says. I do not think that time begins to run .... until it can be said that the contractor or subcontractor had done all that he promised to do and is entitled to maintain his action for the full amount.

33 *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, s. 2(1)(a).

question as to whether it applies at all; for, while subsection 2(1)(a) of the Act defines the term "completion of the contract" to mean substantial performance, and not necessarily total performance, of the contract, subsection 13(1) of the Act, the provision which requires retention of the 10 percent holdback, speaks not of "completion of the contract" but rather "completion or abandonment of the work." It stipulates that the holdback is to be retained "for a period of thirty days after completion or abandonment of the work done or to be done under the contract." As the normal rule of construction is that where different words are used different meanings are intended, it might be argued that, since the requisite triggering words do not appear, the definition does not apply.

Second, even if the definition does apply, ambiguity exists in respect of its ambit and application, particularly as regards section 23 of the Act, the section which establishes the time limits for filing liens. Subsection 23(1) of the Act, sets a thirty day period in the case of claims for liens by a contractor or subcontractor "after the completion or abandonment of the contract or subcontract, as the case may be." As a result of subsection 2(1)(a) "completion of the contract" means "substantial performance." Thus, liens by the contractor may be filed up to thirty days following substantial performance of the contract. The position with respect to subcontracts, however, is less clear. Subsection 2(1)(m) defines "subcontractor" separately from "contractor" which is defined by 2(1)(b). Subsection 2(1)(a) refers only to "completion of the contract" and is silent on subcontracts. In subsection 23(1), the expressions "contract" and "subcontract" are used separately. The question that arises in light of these distinctions is: "Do the words 'completion of the contract' in subsection 2(1)(a) include 'completion of the subcontract' in the interpretation of subsection 23(1)?" Those making representations to us prior to the preparation of our *Working Paper* argued that the state of the law at that time[34] made anything like a definitive answer to this question impossible. Strong representation was made on behalf of owners, in particular Newfoundland and Labrador Hydro,[35] that in view of this uncertainty it would be unwise for an owner to pay over holdback moneys on anything other than total completion of not only subcontracts but also, and more significantly, of the main or prime contract.

Third, in any event, application of the concept of substantial performance to the main or prime contract, would as currently drafted result in injustice.

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34 See David I. Bristow, "Substantial Completion of Contracts Under The Mechanics' Lien Act 1968-69 Ontario," 1972 *Chitty's Law Journal* 124. See also *Union Electric Supply Co. Ltd.* v. *Joice-Sweanor Ltd. et al* (1975), 7. O. R. (2d) 227; *Otis Elevator Co. Ltd. et al* v. *Commonwealth Holiday Inns of Canada Ltd. et al* (1976), 56 D.L.R. (3d) 681; *Fundy Ventilation Ltd.* v. *Brunswick Construction Ltd.* (1983), 40 N.B.R. (2d) 4 (N.B. C.A.); and *Glenway Supply (Alta.)* v. *Knoblock et al.*, [1972] 6 W.W.R. 513.

35 *Brief of Newfoundland and Labrador Hydro to the Newfoundland Law Reform Commission Respecting Certain Provisions of The Mechanics' Lien Act*, prepared by F. R. Bishop (November 22) 1985.

Subsections 23(2), 23(3), and 23(4) provide that as regards lien claims for materials, services or wages the time for filing expires 30 days after the last materials are furnished, the services are completed or the last work of the workmen was done. These events might well occur after substantial performance of the main contract, particularly in the case of the late or finishing trades. This would result in the possibility that liens filed in respect of this work would be otiose, as there would be no holdback moneys remaining which they could attach. We referred in our *Working Paper* to the following representation received in this regard:

> The purpose of the substantial performance definition is to create the distinction between "completion of the contract" and completion of all the work required to be done under the contract. Substantial performance will always be achieved before all the work to be done under the contract is completed. The question is whether a Court would hold that, in the interpretation of subs. 13(1), the statutory definition of "completion of the contract" as substantial performance would be imputed to the expression "completion of the work done or to be done under the contract" when the effect would be to restrict, or negate, the remedy available to a valid lien claimant under subss. 23(2), (3), or (4).[36]

One of the principal ends of mechanics' lien legislation is to provide protection to those who enhance the value of an improvement through the provision of their work, service or materials and who do not have sufficient bargaining power to protect themselves. We concluded in our *Working Paper* that the inconsistent manner in which the doctrine of substantial performance is incorporated into the present Act does little to further this end.

4. (a) (ii) *McLoughlan Supplies Ltd.* v. *Elliston Developments Ltd.*[37]

Since publication of the Commission's *Working Paper* the problems arising from the present substantial performance provisions have been vividly demonstrated in litigation before the Supreme Court of the Province in the case of *McLoughlan Supplies Ltd.* v. *Elliston Developments Ltd.* McLoughlan was a supplier to a subcontractor on a job let to Elliston, the main or prime contractor. The subcontractor experienced financial difficulties and McLoughlan was not paid. McLoughlan eventually filed a lien. The lien was filed on April 14, 1986. This was well within 30 days of the last supply of materials on the subcontract and before substantial performance of the subcontract. The date of substantial performance of the main contract was March 10, 1986. In the action which followed, Elliston argued that McLoughlin's lien was out of time since it had not been filed within 30 days of substantial performance of the main contract. The judgment of the court was that McLoughlan was out of time. It was held that subsection (2) of

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36 *Ibid.* at 3.
37 (1988), 30 C.L.R. 141 (Nfld. S.C.T.D. per Steele J.).

section 23 of the Act must be read subject to the holdback provisions contained in section 13:

> A lien for materials may be registered before or during the placing or furnishing of the materials or within 30 days after the placing or furnishing of the last materials so placed or furnished, subject to the proviso that a claim for lien for materials shall be registered no later than 30 days after the date of substantial performance of the contract or of the subcontract, as the case may be.[38]

The decision in *McLoughlan Supplies* has a number of consequences for the three problems respecting the doctrine of substantial performance articulated in the preceding section and identified in our *Working Paper*. First, it makes clear that notwithstanding the slight variation in wording, the phraseology employed in subsection 13(1) of the Act is sufficient to trigger the substantial performance definition in the interpretation section: "... the language of s. 13(1), 'completion . . . of the work done or to be done under the contract' means 'completion of the contract,' which by virtue of s. 2(1)(a) means substantial performance, not necessarily total performance of the contract."[39] Second, the concept of substantial performance is applicable to both the main or prime contract and to subcontracts. This point is stated with particular clarity in the related case, *McLoughlan Supplies (No. 2)*: "In *Union Electric Supply Co. Ltd. v. Joice-Sweanor Electric Ltd.* (1975), 7 O.R. (2d) 227, 54 D.L.R. (3d) 683 the Ontario Court of Appeal adopted the reasoning in *Otis Elevator Co. v. Commonwealth Holiday Inns of Can.* (1972), 8 O.R. 297, 57 D.L.R. (3d) 681 (H.C.), to find that the concept of substantial performance was applicable to subcontractors as well as general contractors. So then for contractors and subcontractors the period for filing the lien runs from substantial performance."[40] Third, the doctrine of substantial performance extends also to materialmen. It was held that to construe the Act otherwise would be to destroy the scheme which the legislation seeks to establish:

> [I]f it is correct [that] a materialmen has a valid and enforceable claim for lien for materials if registered within 30 days of furnishing the last material, the holdback provisions of s. 13 become frivolous and in reality inoperative. No owner, contractor or subcontractor could safely retain 10 per cent for a period of 30 days after substantial performance (s. 13(1)) and make payments up to 90 percent that would operate as a discharge pro tanto of the lien. (s. 13(6)); nor could they pay the 10 per cent after the expiration of the 30 days. The holdback provisions would, for all practical purposes, be futile as there may exist a valid and enforceable claim by materialmen. They could not safely retain for 30 days after substantial performance just 10 per cent and pay up to 90 per cent for fear of a concealed or unknown materialman with a potentially

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38 *Ibid.* at 159.
39 *Ibid.* at 150.
40 *Ibid.* at 5.

valid claim for lien. For their own protection and to safeguard themselves from liens by materialmen, the owners, contractors and subcontractors would be compelled to disregard s. 13 and await *full* or *total* completion of the contract to make final payments. It is evident the registration of a lien by a materialman within 30 days of furnishing the last materials and not from the date of substantial performance, makes the holdback provisions of s. 13 worthless and frustrates completely the intent and scheme of the Act.

This construction of s. 23 (2) results in bad law. It brings about inconsistency or repugnancy and leads to an absurdity. It is purposeless to give a meaning to s. 23(2) that effectually renders the Act useless. The design of the Act is obvious and clearly, s. 23(2) if accepted literally, makes s. 13 and the holdback provisions impotent thereby crippling the entire statute. It is apparent that the amendment, first appearing in s. 2(1)(a) of the Act, defining "completion of the contract" as "substantial performance" is the root of much of our difficulty. It was an amendment intended to permit an early but still systematic distribution of funds. It is a vivid demonstration of dreadful legislative drafting: in truth, the problems are the result of archaic legislation, injected with a peremptory and arbitrary amendment without sensitivity for the havoc resulting to other sections affected; a pragmatic amendment, by way of the interpretation section, but inserted unmindful of the need for coherence and harmony, one section to another, one section to the whole.[41]

The net result of the decision in *McLoughlan Supplies* is to ensure that the substantial performance amendment of 1970 is given effect. The intent of that amendment had been to facilitate the expeditious flow of holdback moneys throughout the construction pyramid without exposing the owner to potential double liability. The decision achieves this end, but does so at the expense of materialmen and the finishing trades generally, both of which interest groups are left unprotected after substantial performance. The Court recognizes and laments this fact when it characterizes the amendment as having been inserted in a peremptory and arbitrary fashion ". . . without sensitivity for the havoc resulting to other sections affected."[42] What is required if the Acts' protective ends are to be achieved is that this "pragmatic amendment" be incorporated with full and careful attention to its effects on the scheme as a whole.[43] The decision reinforces the conclusion reached in the Commission's *Working Paper* that the doctrine of substantial performance as enshrined in the current legislation is in need of considerable

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41 *Ibid.* at 158.

42 See *supra* n. 41. See *McLoughlan Supplies Ltd.* v. *Elliston Developments Ltd.*, (No. 2) *supra* n. 2 at 5 where Cameron J. says:
[T]o accept the argument that the lien rights of the materialman are limited to those claimed within 30 days of substantial performance is to effectively deny any remedy to many. There is no mechanism for informing materialmen when substantial performance has occurred. Further, those involved in "finishing" trades may not commence work until after substantial performance.

43 Compare the approach in *McLoughlan Supplies* with that taken in *Re Queen Elizabeth Hospital Inc.* (1982), 38 Nfld. and P.E.I.R. and 108 A.P.R. 121 (P.E.I.S.C. per McQuaid J.).

revision if it is to be the instrument of beneficial effect throughout the pyramid.

The Commission recommends:

8. The doctrine of substantial performance should be retained; however, it should be consistently incorporated throughout the Act. Clarification in respect of its ambit and application is required particularly as regards the expiration of lien rights and release of the holdback.

(b) The Solution

(i) Introduction

The holdback represents money already earned by those who have enhanced the value of the improvement through the provision of work, services and materials. The purpose of the substantial performance amendment was to facilitate the early release of this money to those who had earned it in the interests of promoting efficiency by reducing costs. To achieve this end, however, and to remove all ambiguity in respect of its application so that (a) owners might act in accordance with it without risking double liability and (b) the protection afforded the late or finishing trades is not eroded, the concept of substantial performance needs (i) to be consistently incorporated throughout the Act and (ii) a second holdback established for the benefit of those providing work, services and materials during the period commencing after substantial performance of the main contract and running until total completion. A number of reform jurisdictions with legislative provisions similar to those currently in force in this Province have moved to effect changes of this nature.[44] We suggested in our *Working Paper* that, as Ontario has been in the forefront of these reform efforts, a review of that Province's new legislation might prove instructive.

(ii) The Ontario Regime

Subsection 22(1) of Ontario's *Construction Lien Act*, 1983[45] provides that a payer[46] upon a contract shall retain the holdback until "all liens that may be claimed against the holdback have expired as provided in Part V."[47] Section 26 provides that each payer upon a contract "may, without jeopardy, make payment of the holdback he is required to retain by subsection 22(1) so as to discharge all claims in respect of that holdback, where all liens that

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44 Saskatchewan, *The Builders' Lien Act*, S.S. 1984-85-86, B - 7.1, s. 34(1), s. 49; Manitoba *The Builders' Liens Act*, S.M. 1980-81, c. 7 - B91, s. 24(1), s. 25, s. 43, s. 44; Ontario, *Construction Lien Act, 1983*, S.O. 1983, c. 6, s. 22, s. 31.

45 S.O. 1983, c. 6.

46 "Payer" is a term of art under the new legislation. It replaces the phrase "the person primarily liable upon a contract" found in various provisions of *The Mechanics' Lien Act*. Payer is defined S.O. 1983, c. 6, s. 1(1)16 to mean "...the owner, contractor, or subcontractor who is liable to pay for the materials or services supplied to an improvement under a contract or subcontract."

47 Part V of the Act is entitled "Expiry, Preservation and Perfection of Liens."

may be claimed against that holdback have expired as provided in Part V." Section 29 provides that "payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid."

Section 31 of the Ontario Act, the opening section of Part V of that Act, sets out when liens expire. Subsection 31(2) provides that the lien of a contractor on a supervised contract expires forty-five days after the earlier of "the date on which a copy of the certificate or declaration of substantial performance is published" and "the date the contract is completed or abandoned." On an unsupervised contract or where there is no certification the lien of a contractor expires forty-five days after the earlier of the date the contract is completed and the date the contract is abandoned. Subsection 31(3) provides that the lien of any other person on a supervised contract expires forty-five days after the earliest of "the date of publication of the certificate of substantial performance," the date on which that person last supplies services or materials, and the date the subcontract is certified to be completed. On an unsupervised contract or where there has been no certification, the lien of any other person expires forty-five days after the earlier of the day he last supplied services or materials and the day the subcontract was certified to be complete.

We pointed out in our *Working Paper* that the expiry regime spelled out in Part V of the Ontario Act was introduced only after much debate. It differed materially from the *Discussion Draft* provision which preceded it, particularly in respect of subcontracts. One of the principal concerns addressed by the equivalent provision of the *Discussion Draft* was the anomalous situation under *The Mechanics' Lien Act* with respect to the expiration of lien rights under subcontracts. The explanatory note that accompanied the *Discussion Draft* proposal reads in part as follows:

> A major anomaly that existed under the *Mechanics' Lien Act* is avoided in the draft. Under section 11 of *The Mechanics' Lien Act*, the holdback must be retained until after 37 days after the completion (or substantial performance) of the contract. However, the right to register a lien is governed by section 21 which provides a different period. As a consequence, the right to lien, in many cases, under the existing Act ends long before the holdback can properly be paid. Under the Draft the right to preserve a lien coincides with the requirement to retain a holdback. Both the period of the holdback and the expiry of liens are governed by section 32 of the Draft.[48]

The Attorney General's Advisory Committee rejected the *Discussion Draft* solution. Their objections and alternate proposal are recorded thus:

> After lengthy consideration the Committee concluded that the scheme proposed in the Discussion Draft would create more problems than it

48 Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (1980) at p. 61.

> solved. The effect of the scheme would have been that the lien rights of workers, suppliers and subcontractors would have expired following certain specific events that would be unknown to them, for example, the certification of the completion of a subcontract or the abandonment of a subcontract. After study, the Committee decided that there is no practical system of giving notice of such events. On balance, it is the Committee's view that it is more important for those with lien rights to know when those rights begin to expire than to have a claim period closely related to release of the holdbacks. The Committee believes that it is best to continue to employ a well known test for determining the date when the lien rights of a supplier begin to expire, namely the date of his last supply of services or materials to the improvement.[49]

Thus the Committee proposal, which was subsequently enshrined in Section 31 of *The Construction Lien Act, 1983,* came down on the side of certainty.

We noted in our *Working Paper* that the Committee's approach and the subsequent legislation has not met with universal acclaim. We referred to the work of Kevin McGuinness, who served as secretary to the Committee. After a lengthy examination of both the *Discussion Draft* and the *Committee Report*, McGuinness concludes in his book on *Construction Lien Remedies in Ontario* as follows:

> The consequences of [the Committee] approach ... are anything but beneficial to the industry. They are especially harmful to those who supply services or materials only during the early stages of the project. One highly desirable feature of the Discussion Draft was that a person's lien would never expire until such times as he was entitled to receive his share of the holdback. This is not the case under ... the Committee Draft.... Under the Committee Draft, the supplier's lien rights would begin to expire as of the day on which he made his last supply to the improvement. But the supplier is not necessarily entitled to receive his share of the holdback merely because his lien rights have expired. Instead, the holdback will continue to be retained from him, not for his benefit, but rather for the benefit of those who are continuing to supply services or materials under the contract. Except where the subcontract is certified as complete, the supplier will not be paid the holdback until the time for the release of the holdback folowng the substantial performance of the

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49 Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (1982) at p. 74.

> contract. However, ... the certification of the completion of a subcontract is relatively rare.[50]

The problem, in McGuinness' opinion, with both the *Discussion Draft* and the *Committee Report* is with the entire notion of certification of completed subcontracts. The *Discussion Draft* had advocated a system of mandatory certification. This was rejected as unworkable by industry and as contrary to the notion of the holdback as a kind of insurance fund.[51] The *Committee Report* proposal of a voluntary scheme must, however, be regarded as equally untenable as it necessitates the curtailment of the lien rights of all suppliers and is just as contrary to the insurance purpose of the holdback regime.[52] The solution, McGuinness claims, is obvious:

> The most logical option to have adopted would have been to abandon the certification of the completion of subcontracts entirely, and to have provided for the expiration of lien rights and the consequent release of the holdback solely in reference to the contract itself. Had this been done, the expiration of lien rights and the release of the holdback would have coincided, and no supplier would have been forced to guess as to the future.[53]

To tie the expiration of lien rights and release of the holdback to a single, clearly ascertainable event, be it the substantial performance of the main contract or its completion, would allow for a workable fully integrated scheme. More importantly, it would prevent glaring inequities and ensure that the residual fund constituted by the holdback serves the purpose for which it was intended.

(iii) The *Working Paper Proposals*

The reform proposals contained in the Commission's *Working Paper* aimed, to the extent reasonable, at bringing together McGuinness and the Ontario *Committee Report* scheme. We attempted to construct a regime which was as streamlined as possible and which would provide owners and suppliers with a maximum of certainty. We proposed that the substantial performance doctrine not apply to subcontracts and that the release of the holdback on the certification of completed subcontracts, as currently

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50 McGuinness *supra* n. 4 at pp. 325-326.

51 *Ibid.* At p. 320 McGuinness notes:
[T]he purpose of the holdback is to serve as a type of insurance fund. The essential concept of any insurance is that of risk spreading.... Nevertheless, sections 26 and 34 of the Discussion Draft undermined this concept, since they permitted the release of the holdback to completed subcontractors. With each such release, there would have been progressively fewer persons among whom to spread the risk of an eventual default. Thus, in effect the mandatory certification system in the Discussion Draft would have preferred the early subtrades to the later ones.

52 *Ibid.* at p. 326:
"If it defeats the insurance purpose of the holdback to release it piecemeal to fully completed subcontractors, it is equally inconsistent with this insurance purpose to impose a scheme which effectively bars those subcontractors from claiming against the fund at the point in time when this right is most necessary."

53 *Ibid.*

provided for in subsections 13(2), 13(3), and 13(4) of the present Act, be eliminated. The notion of substantial performance was otherwise to be consistently incorporated throughout the Act, the anomalies contained in subsection 2(1), 13(1) and 23(1) removed and the provisions dealing with the expiration of lien rights to be recast on the model of section 31 of Ontario's *Construction Lien Act, 1983*. These proposals, with the exception of the recommendation respecting the release of holdback on the certification of completed subcontracts, were greeted favourably by our respondents.

The objection to the proposed elimination of the early release of holdback on completed subcontracts was surprising in both its intensity and consistency. The following may be taken as representative of the adverse response received:

> 1. Newfoundland and Labrador Construction Association:
>
> At page 60, [of the Commission's *Working Paper*] it is recommended that "the early release of holdback on completed subcontracts should be disallowed. Subsections 13(2), 13(3), and 13(4) of The Mechanics' Lien Act should be repealed." While the Association appreciates the benefits of having a "fully integrated scheme," it is felt that in this instance the negative impact of such a change would offset any such benefit. The current mechanism provides a valuable service, as it allows a subcontractor, whose role on a project may be finished months or years before construction is completed, access to his holdback after expiry of the lien period. It would be a serious hardship for a builder to have his money unnecessarily tied up in this fashion; the Association therefore rejects this recommendation.[54]
>
> 2. Newfoundland and Labrador Construction Association--General Contractors Subsection:
>
> We would point out that the recommendation that the early release of holdback on completed subcontracts be disallowed is totally unfair and unrealistic in these times. On larger jobs, contractors performing the site work, steel erection and at times masonry are unjustly penalized for performing work quickly and efficiently by the holdback of subcontract monies due them. Having to finance a job for the Owner in this means can only increase prices and have detrimental effect on the cash flow and financial health of the earlier contractors. Therefore, we would suggest that in the best interest of the industry, this be left alone.[55]

The motive for suggesting that subsections 13(2) - 13(4) of *The Mechanics' Lien Act* should be repealed was essentially that the provisions were little used. We referred in our *Working Paper* to McGuinness who points out that "the certification of the completion of subcontract is relatively rare," and the brief from the Department of Public Works and Services in response to our *Working Paper* confirmed this. That Brief said:

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54 *Brief Respecting Working Paper on The Mechanics' Lien Act* (October 1988) at 1-2.
55 *Brief Respecting Working Paper on The Mechanics' Lien Act* (November 1988) at 1.

> The Department, in the past, had been prepared to provide for early release of holdback for certain completed subcontracts. General contractors rarely availed of this offer because they were unwilling to provide the information the Department requested.
>
> It has always been difficult to determine if a General Contractor pays his subs and suppliers and if the subcontractor pays his subs and suppliers. The owner does not normally see, nor is he party to the agreement that the General Contractor has on the job between his subcontractors and suppliers. In the past on certain major projects, the Department has been prepared to provide early release of holdback for certain subcontracts that have been completed prior to the completion of the project itself. The Department required certain obligations and verifications from the general contractor such as those outlined in the Government's Standard Construction Contract General Conditions 21.4, Certificates and Payments.
>
> Few of the General Contractors ever took up the offer because they were reluctant to provide a copy of the contractual agreement between that subcontractor or supplier.[56]

This response, though supportive of the *Working Paper* analysis, was very much a minority view.

(iv) The Commission's Recommendations

The tentative proposal contained in the Commission's *Working Paper* respecting completed subcontracts was grounded in the premise that these provisions are seldom used and that their elimination would help streamline the Act. The overwhelming majority of those who responded expressed the strong view that the provisions should be retained. We found this somewhat puzzling given the empirical evidence of non-use available to us, the experience of owners, like government, and academic opinion. Be this as it may, there can be no doubt that the preponderance of comment received in respect of subsections 13(2) - 13(4) was that these provisions allowing certification of completed subcontracts provide a valuable service, if only potentially. After much discussion, we concluded that, in light of the strong desire expressed by industry for retention, the mechanism outlined in subsection 13(2) - 13(4) should be incorporated into any new lien legislation enacted in the Province. In so concluding, we noted that the provisions harm no one and might, if their application could be made sufficiently specific, receive greater use in the future.

Indeed it is clear that if greater use were made of these provisions, this would go a long way towards answering the concerns which McGuinness identifies respecting the undue hiatus between the time when lien rights expire

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56 Comments on Working Paper by the NLRC for the *Mechanics' Lien Act* (August 1988) at 6, 4. See also McGuinness, *supra* n. 4 at 313 who comments to similar effect on equivalent provisions contained in Ontario's *Mechanics' Lien Act*.

on subcontracts and the time when the holdback might otherwise be released on the attainment of substantial performance of the main contract. An effective early release mechanism on subcontracts would complement the objective served by the substantial performance doctrine, help protect suppliers and expedite the flow of funds throughout the pyramid. Thus, if the provisions are to be retained, their effective and more frequent use should be encouraged.

The Commission recommends:

9. In any new lien legislation passed in the Province, Subsections 13(1) and 23(1) of *The Mechanics' Lien Act* should be amended so as to clearly provide for release of the holdback upon expiry of the relevant statutory period.

10. Where it is intended that release is dependent upon "substantial performance," these words should be used. In the interest of clarity and consistency, the words "the work done or to be done" contained in subsection 13(1) of the present Act should be removed. The definition of "completion of the contract" contained in subsection 2(1) of The Mechanics' Lien Act should be repealed.

11. The doctrine of substantial performance should not apply to subcontracts. However, the early release of holdback on completed subcontracts should be retained. Greater use of this release mechanism should be encouraged.

12. Section 31 of Ontario's *Construction Lien Act, 1983* provides, with appropriate amendment, a suitable model for recasting subsections 23(2), 23(3) and 23(4) of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229.

(c) Certification Mechanism

(i) Substantial Performance of the Main Contract

If the intent of early release of holdback moneys is to be effectively realized, it is necessary that all parties within the construction chain be clear as to when substantial performance of the contract has been achieved. It is also essential that the various players be clear as to what their respective rights and obligations are on attainment of this crucial point in the life of the project. We have noted above that the current legislation makes the determination of both of these issues difficult. Ambiguities in sections 2, 13, and 23 have resulted in the present early release mechanism not being utilized to the fullest extent possible. It is patent that, if the new early release regime

which we recommend is to work, an adequate certification and notice mechanism must be developed.

Reform legislation enacted in Manitoba,[57] Ontario,[58] and Sasatchewan[59] contains elaborate rules governing the certification or declaration of a contract as substantially performed. Because the Ontario model is the one that parties who made representations to us most often referenced, it is this that we use as the focal point of our discussion. We note that the certification procedures in all of the reform jurisdictions mentioned are in large measure similar. Where differences of significance exist, as for example in respect of the notice mechanism, we will point them out and discuss their relative merits as we proceed.

Subsection 32(1) of Ontario's *Construction Lien Act, 1983* states:

> 32. (1) The following rules govern the certification and declaration of the substantial performance of a contract:
>
> 1.On the application of the contractor, the payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed in accordance with section 2, and where he or they so determine, shall certify the substantial performance of the contract by signing a certificate in the prescribed form.

The relevant provisions of Section 2 of the *Act* state:

> 2. (1) For the purposes of this Act, a contract is substantially performed,
>
> (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
>
> (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
>
> (i) 3 per cent of the first $500,000 of the contract price,
>
> (ii) 2 per cent of the next $500,000 of the contract price, and
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> (iii) 1 per cent of the balance of the contract price.
>
> (2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be

57 S.M. 1980-81, C.7/B91, s. 46.
58 S.O. 1983, c. 6, s. 32.
59 S.S. 1984-85-86, B-7.1, s. 41.

supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

"Payment certifier" is defined in subsection 1(1)17 to mean an architect, engineer or any other person upon whose certificate payments are made under a contract. Subsection 32(3) provides that the date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of the Act to be the date on which that event occurred. Where there is a failure or refusal to certify substantial performance, either by the payment certifier or by the owner-contractor, within a reasonable time any person may apply to the Court and the Court may declare that the contract has been substantially performed. The content and form of the certificate are prescribed by subsection 32(2). Subsection 32(3) provides for civil liability in the event of a failure or a refusal to certify substantial performance by any person who is required to make such a determination. This last provision is intended to ensure timely action on the part of payment certifiers.

The certificate or declaration of substantial performance is not effective unless published in the prescribed form and manner in a construction trade newspaper. It is by this means that notice is provided to all interested parties that this pivotal event in the life of the project has been achieved and it is from this occurrence, viz. publication, that the lien preservation periods generally begin to run. The newspaper used is the *Daily Commercial News and Construction Record*. Each edition contains a separate section devoted to notices of certification of substantial performance of contracts under section 32 of *The Construction Lien Act, 1983*. Subsection 32(2) of this Act prescribes:

(2) Every certificate or declaration made or given under this section shall include,
(a) the name and address for service of the owner and of the contractor;
(b) the name and address of the payment certifier, where there is one;
(c) a short description of the improvement;
(d) the date on which the contract was substantially performed;
(e) where the lien attaches to the premises, a concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises; and
(f) the street address, if any, of the premises.

Subsection 31(2) of the Ontario Act provides that the lien of a contractor for services or materials supplied to an improvement on or before the date of substantial performance expires forty-five days after the occurrence of the earlier of (i) the date on which a copy of the certificate or declaration of substantial performance is published; and (ii) the date the contract is

completed or abandoned.[60] Subsection 31(3) establishes a slightly more involved regime for expiry of the lien preservation period of "other persons" viz. subcontractors, workers, etc.[61] The provisions of that subsection stipulate that the liens of these other persons for services or materials supplied to an improvement on or before substantial performance expire forty-five days after the earlier of (i) the date on which a copy of the certificate of substantial performance is published; (ii) the date a subcontract is certified to be completed, where the services or materials were supplied under or in respect of that subcontract; and (iii) the date of his last supply of services or materials. As indicated above, this last alternative was at variance from the *Discussion Draft* proposals and was adopted only after much debate.[62]

In Manitoba and Saskatchewan while the machinery for certification of substantial performance is in essentials similar,[63] the notice procedure and the mechanism for starting time running is not. In Manitoba, it is the giving of the certificate of substantial performance by the payment certifier, or in the appropriate case the owner, to the contractor and/or the owner that marks the commencement of the lien preservation period. Section 47 of *The Builder's Lien Act*, S.M. 1980-81, c. 7/B91, provides that a certificate of substantial performance is not effective unless it is given to the contractor and to the owner. The lien preservation regime is spelled out in section 43 of the Act. We may take subsection 43(4) as representative. It states that except as regards the finishing holdback a lien for services may be registered at any time before or during the provision of services or (i) within 40 days after the substantial performance or abandonment of the contract; or (ii) within 40 days after the completion of the provision of services, whichever occurs first. With the exception of the actual length of the limitation period, this is substantially similar to subsection 31(3) of the Ontario Act.

The Saskatchewan Advisory Committee had the advantage of considering the predecessor work that had been done in both Manitoba and Ontario. As regards an appropriate notice procedure for substantial performance, the *Saskatchewan Report* noted:

> The Committee felt that it was important that the issuing of a certificate of substantial performance be brought to the attention of those persons most affected by it. However, the Ontario approach which requires the actual publication of the certificate in a construction trade newspaper may not be an acceptable solution in Saskatchewan. The fact that

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60 The lien in respect of services or material delivered after the date of substantial performance, viz. the late trades, is dealt with below. See *infra* section 3(ii)(c).

61 See *Kirsh supra* n. 1 at 67f.

62 *Supra* at 42f.

63 In instances of a failure or refusal to certify, Saskatchewan provides for arbitration as an optional intermediary step before a Court application.

> Saskatchewan does not have a construction trade newspaper or one paper with universal publication in the province would make newspaper publication impractical. The Manitoba approach which reuires the owner to give notice to persons who have requested it would seem to be preferable. In addition, the Committee felt that the posting of the notice on the job site would be useful.[64]

Section 41 of *The Builders' Lien Act*, S.S. 1984-85-86, B-7.1, gives effect to the recommendations contained in the *Report* respecting certification and notification of substantial performance.

We indicated in our *Working Paper* that after careful consideration of the approaches adopted in the three jurisdictions examined we favoured an Ontario model. We took notice of the fact that the standardized stipulated price contract prepared by the Canadian Construction Documents Committee provides for interim progress payments as the work proceeds upon the certificate of a payment certifier. We recommended that upon application of the contractor, the payment certifier or in the absence of a payment certifier, the owner and contractor jointly, should be charged with determining and certifying when substantial performance has been achieved. We recommended further that in the event of a failure or refusal to issue a certificate of substantial performance within a reasonable time, any person should be entitled to apply to the Court and the Court may make the necessary determination. The Court should also be entitled to make any order as to costs or otherwise as it deems appropriate. We received no adverse comment in respect of these recommendations. We are prepared to confirm them.

As regards the criteria to be used in assessing whether substantial performance has been achieved, we believe that the test contained in present subsections 2(2) and 2(3) viz. use and percentage dollar value of the work remaining to be done, should be retained with two alterations. In subsection 2(2) the phrase "shall be deemed" should be replaced by the word "is" and the dollar amounts should be increased from $250,000 to $500,000. These changes are in line with developments elsewhere; the increased dollar amount is consistent with the effect of inflation since the Act's introduction.[65]

With respect to the notice mechanism to be employed, we indicated in our *Working Paper* that our view was that simplicity favoured a publication regime such as that in place in Ontario. As with the *Saskatchewan Report*, we noted the absence in this Province of a commercial trade newspaper. However, this lack may be remedied by use of the provincial *Gazette*. We were informed by the *Office of the Queen's Printer* that it would be able to accommodate publication of such certificates and would require a maximum

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64 *Saskatchewan Report*, *supra* n. 3 at 67f.
65 See *ibid.* at 164-167; see also *Ontario Committee Report*, *supra*, Ch. 1, n. 1 at 25-26.

lead time of fourteen days. We received no adverse comment as regards a publication requirement. We are prepared to confirm it.

Publication in the *Gazette* will also serve as the pivotal point as regards commencement and expiry of the lien preservation period. The lien of a contractor for work performed before the date of substantial performance should expire on termination of the statutory period following the earlier of (i) publication of the certificate in the *Gazette* and (ii) completion or abandonment of the contract. The lien of any other person for work performed before substantial performance should expire on termination of the statutory period following the earlier of (i) publication of the certificate of substantial performance in the *Gazette*; (ii) the date a subcontract is certified to be completed, where the services or materials were supplied under or in respect of that subcontract; and (iii) the date of the last provision of work, services, or materials. As indicated above, this last alternative appears to be desirable in the interest of certainty. It is not clear that publication would be adequate in the case of each and every small supplier while the date of last supply will be clearly known. We note that with slight variation this event is used in two of the three jurisdictions examined.[66]

The Commission recommends:

13. The following rules should govern the certification of a contract as substantially performed:

(a) where the contract is under the supervision of a payment certifier, the payment certifier should be required to certify substantial performance of the contract;

(b) where the contract is not under the supervision of a payment certifier, the owner and contractor jointly should be required to certify substantial performance;

(c) the certificate of substantial performance should be provided within a reasonable time after receipt of a demand by a contractor;

(d) where the payment certifier or owner/contractor fail to certify substantial performance, access to the Courts should be allowed;

(e) the content and form of the certificate should be prescribed by regulation; and

(f) the certificate of substantial performance should be published once in the *Newfoundland Gazette*.

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66 S.O. 1980, c. 6, ss. 31(3); S.M. 1980-81, c. 7/B91, s. 43.

14. The lien preservation period for work, services or materials supplied before the date of substantial performance should expire upon termination of the statutory period following the earlier of:

(a) in the case of a contractor, 1. publication of the certificate in the *Gazette* and 2. completion or abandonment of the contract; and

(b) in the case of any other person, 1. publication of the certificate in the *Gazette*, 2. the date a subcontract is certified to be completed, where the services or materials were supplied under or in respect of that subcontract, and 3. the last provision of work, services or materials.

15. The criteria with respect to determining substantial performance contained in subsection 2(2) and 2(3) of the present *Mechanics' Lien Act* should remain with the following amendments:

(a) the dollar amount should be increased from $250,000 to $500,000;

(b) instead of the contract being presumed to be substantially performed upon the happening of events, the contract should be declared to be substantially performed upon the happening of the events listed.

(ii) Certification of the Completed Subcontracts

We have recommended that the substantial performance doctrine not apply to subcontracts. Application of that doctrine to subcontracts would not appreciably accelerate the flow of funds throughout the construction chain; indeed, it would add further complexity to the release of the holdback at a point where additional administrative complexity is not needed.[67] We have, however, been persuaded in accordance with the majority view put before us, that early release of the holdback on the certification of completion of subcontracts should continue to be allowed. This would carry forward the policy enshrined in subsection 13(2)-13(4) of the present Act as requested by the preponderance of those who responded to our *Working Paper*.[68]

What should be the mechanism for the certification of completion of a subcontract? Section 33 of Ontario's *Construction Lien Act, 1983* provides a model which builds upon a process similar to that embodied in section 13 of this Province's current statute. The new Ontario enactment provides:

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67 See NLRC-WP3 (April 1988) at 57. See also *The Nova Scotia Report*, *supra* Ch. 1, n. 15, at 116; *The Ontario Discussion Draft*, *supra* Ch. 1, n. 15, at 32; *The Ontario Committee Report*, *supra* Ch. 1, n. 15, at 25-26; and *The Saskatchewan Report*, *supra* Ch. 1, n. 15, at 154-155; where it said:

> . . . The Committee was concerned that if the concept of substantial performance were to apply to subcontracts . . . it would be necessary to resolve the issue as to who can participate in the holdback accruing from the date of substantial performance of the subcontract until completion of the subcontract.

68 See *supra*, s. 4(b)iii. of this Chapter at pp. 44 f.

33. (1) Upon the request of the contractor, the payment certifier on the contract, or the owner and the contractor jointly, may determine whether a subcontract has been completed, and where he or they so determine, he or they may certify the completion of the subcontract in the prescribed form.

(2) Where a subcontract is certified to be completed, the subcontract shall be deemed to have been completed on the date of certification.

(3) If services or materials are supplied to the improvement under or in respect of a subcontract after the date the subcontract is certified to be completed, those services or materials shall be deemed to have been last supplied on the date of certification.

(4) Within seven days of the date the subcontract is certified to be completed, the payment certifier or the owner and the contractor, as the case may be, shall give a copy of the certificate,

(a) to the subcontractor whose subcontract has been certified as complete; and

(b) to the owner and the contractor, where certification is by the payment certifier.

We have indicated above that the certification mechanism contained in section 33 of *The Construction Lien Act, 1983* is, at the request of industry in Ontario, voluntary. We have said, however, that its regular use would be very beneficial. In a recent essay on "Contracts and the Construction Lien Act," W. S. J. Swybrous makes a similar point:

> Despite the fact that certification of completion of a subcontract is purely voluntary, I suggest that it behoves both an owner and contractor to adopt the practice of certifying subcontracts. First, if a subcontract is certified as required under the Act, in the absence of gross error or fraud the certificate will be conclusive as to the lien time running in respect of that subcontractor and all below him in the construction pyramid. Second, a subcontractor who is faced with a flat refusal to issue such a certificate will no doubt register his lien, given that his lien will commence to run whether a certificate is granted or not.
>
> Further, it behoves the contractor to protect his rights in the event that the owner or payment certifier flatly refuses to consider certification of subcontracts. The contractor should place the owner and payment certifier on written notice that, should the subcontractor involved or any of his subtrades register liens so as to protect their rights, all costs and expenses incurred by the contractor to deal with those liens will be to the owner's account. *To my mind, I can think of no significant disadvantage to the owner nor indeed to the contractor in certifying subcontracts complete; unless of course, the contractor unwisely enters into a sub-*

contract which stipulates that a certificate of completion of the sub-contract constitutes a release of all claims. [emphasis added][69]

It should also be said that certification of completed subcontracts would expedite the flow of contract funds down the construction chain with a resultant decrease in project cost.

The Commission has recommended an Ontario model with respect to the certification of substantial performance of the main contract. We believe that section 33 of the *Construction Lien Act, 1983* contains an appropriate mechanism for the certification of completion of subcontracts. The procedure therein articulated builds upon provisions identical to subsections 13(2)-13(4) of the present Newfoundland *Act*, which provisions we have seen are widely acceptable to industry in this Province. Our hope is that the new procedure will be more widely used than its predecessor appears to have been.

The Commission recommends:

16. The mechanism for certification of completion of subcontracts, as provided in subsections 13(2)-13(4) of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be recast on the model of Section 33 of Ontario's *Construction Lien Act, 1983*.

(d) The Late Trades Holdback

Application of the concept of substantial performance to the main or prime contract leaves open the question of the nature and extent of the protection to be afforded the lien rights of those who provide work, services and materials to the improvement after the date of substantial performance. Under the present Newfoundland legislation this issue is not addressed. Representations received prior to the preparation of our *Working Paper*, in particular representation from late suppliers, indicated that resolution of this issue was of some importance. The Commission was persuaded by these representations. In pursuance of them, we recommended in our *Working Paper* that a late trades holdback, intended to provide protection to those who work at the tail end of a project, should be introduced into this Province's lien legislation.

Though this proposal was greeted favourably by late suppliers, it did generate some adverse comment from other quarters. Seabord Construction wrote as follows:

> If we accept the premise of the Mechanics Lien Act surely there must be a limit to how many people are protected for how long, and I believe

69 Swybrous, "Contractors and the Construction Lien Act," in *The Construction Lien Act: Issues and Perspectives* (1989), ed. Kirsh at p. 123.

that this recommendation exceeds that limit. There should be no such thing as a "late trades holdback."[70]

In a similar vein, the Newfoundland and Labrador Construction Association : General Contractors' Section complained that:

> The creation of a late trades holdback only tends to hamper the completion of work with the knowledge of subcontractors that they will still not be paid 100% for their work until the job is totally complete. This new provision will only tend to complicate and prolong the total completion of work and complicate the final paper work and administration of all projects.[71]

It is perhaps understandable that general contractors, or some of them, should regard the "late trades holdback" solely from the perspective of the administrative impact it will have on them. However, the *McLoughlan Supplies* cases examined above[72] amply demonstrates the inequities which result when the holdback is entitled to be released before lien rights expire. The late trades holdback is designed to correct a palpable shortcoming in the present system. We are not persuaded by the comment to the contrary which we received.

The concept of a "late trades holdback" is not new. It has been incorporated into reformed lien legislation in Manitoba,[73] Ontario,[74] and Saskatchewan[75] to protect the lien rights of those who work at the end of construction projects. In each of these jurisdictions the legislation requires retention of a second holdback, generally known as the "finishing holdback," to cover work services and materials supplied to the improvement after the date of substantial performance. The Ontario legislation may again be taken as representative.

As seen above, subsection 22(1) of Ontario's *Construction Lien Act, 1983* provides for the retention of a "basic holdback."[76] It stipulates that the owner shall retain a holdback equal to 10 percent of the price of the services or materials as "they are actually supplied under the contract or subcontract." Subsection 22(2) establishes a separate holdback for finishing work. Where services or materials remain to be supplied to complete a contract after the date the main contract is substantially performed, the payer upon the contract is directed to retain from the date of substantial performance, a "separate holdback equal to 10% of the price of the remaining services or material as they are actually supplied under the contract." In the case of the contractor, this second holdback may be

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70 *Brief on The Working Paper Respecting Mechanics' Liens* (October 1988) at 5.
71 *Brief Respecting The Working Paper on Mechanics' Liens* (November 1988) at 2.
72 *Supra* section 4(a)(ii) of this chapter at pp. 38f.
73 S.M. 1980-81, c.7-B.91, ss. 24(2), 44.
74 S.O. 1983, c. 6, s. 22(2), 31(2), 31(3), 31(4).
75 S.S. 1984-85-86, B-7.1, ss. 34(1), 43.
76 Supra at 41f.

released forty-five days after the earlier of (i) the date the contract is completed, and (ii) the date the contract is abandoned. In the case of any other person, it may be released forty-five days after the earlier of (i) the date of last supply and (ii) the date of completion of a certified subcontract. Where a person supplies services and materials both before and after the date of substantial performance, subsection 31(4) provides that the lien in respect of the services or materials supplied before the date of substantial performance will expire, without affecting rights in respect of supplies made after that date. By creating two separate liens in such situations, the holdback accrued as of substantial performance may be safely released without depriving individuals of their lien rights for work services and materials supplied after that date. This procedure also ensures that only those persons who provide services or materials after the date of substantial performance are able to participate in the fund created from the date of substantial performance until total completion of the main contract. Subsection 2(3) of the Ontario Act deems a contract to be completed and services or materials to be last supplied when the price of completion or last supply is not more than the lesser of (i) 1 percent of the contract price; and (ii) $1,000.

The Commission continues to be of the view that this Province's *Mechanics' Lien Act* should be amended to provide for the introduction of a late or finishing holdback. We believe that this device would ameliorate the deficiency identified by the *McLoughlan Supplies* cases by providing protection to late suppliers. We believe also that a definition of completion of the contract similar to that contained in the Ontario Act should be included. This would help eliminate doubt as to when this event has been achieved and thus facilitate release of holdback funds.

The Commission recommends:

17. The Province's lien legislation should be amended to allow for the introduction of a late trades holdback, which holdback is to provide protection for late suppliers. The fund so constituted is to be subject only to the liens of persons providing services or materials from the day of substantial performance until total completion of the contract.

18. Where a person supplies services and materials both before and after the date of substantial performance, the lien in respect of services or materials supplied before the date of substantial performance will terminate upon expiry of the statutory period following substantial performance of the main contract. The lien in respect of services or materials supplied after the date of substantial performance will terminate upon expiry of the statutory period following the earliest of (i) the date of last supply, (ii) the date the contract is completed, and (iii) the date the contract is abandoned.

19. The Province's lien legislation should be amended to allow for the introduction of a definition of completion of the contract immediately after the definition of substantial performance. This definition should provide that

for the purposes of the Act a contract is deemed to be complete and services or materials last supplied when the price of completion or last supply is not more than the lesser of (i) 1 percent of the contract price, and (ii) $1,000.

5. Holdback on Large Contracts

Prior to the preparation of our *Working Paper*, the Commission received representations urging that where contracts are of a large dollar value a mechanism should be devised to allow for the early release of holdback if no liens are registered. It was explained that while the holdback provisions of the Act might work reasonably well for relatively small jobs of short duration, there was a real problem with respect to major contracts, particularly as regards the size to which the holdback can grow and the length of time over which it must be retained. In such situations the carrying charges constitute a substantial hardship to the owner and to all parties from whom holdback moneys must be withheld. The brief submitted on behalf of Newfoundland and Labrador Hydro summarized the problems as follows:

> 1. At the end of a large contract the 10% retention can amount to a very considerable sum of money, (in Hydro's experience, up to in excess of $5 million), some of which will have been held for a number of years;
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> 2. If the contractor builds in the carrying charges on the lien money in its contract price, the owner will in fact be adding a cost to the project related to the difference between the contractor's borrowing rate and the owner's rate, which may be substantially lower;
>
> 3. To build in an interest rate to cover the life of the holdback, perhaps a period of several years, contractors have to make assumptions about the future cost of money. If rates fall, there is a windfall to the contractor. If rates rise, the contractor will be hurt - possibly to both its and the owner's detriment. Again, early or late completion would affect the timing of holdback release, and thus the appropriateness of the sum provided in the bid to offset carrying the cash flow reduction;
>
> 4. In a contract that extends over several years there may be the same, or even a greater, level of activity earlier in the contract than towards the end, yet the holdback keeps growing and growing. There comes a point where current liabilities respecting the contract become very unlikely to amount to 10% of the value of all work done to that date. If a contractor has been working for several years and completed, say, $30 million worth of work, is it likely that his suppliers and workmen would have let him fall behind in an amount approaching the $3 million lien fund? The difference in the exposure does not seem to warrant the difference in the size of the holdback at the end of the job, as compared to at the beginning.[77]

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77 *Brief of Newfoundland and Labrador Hydro to the Newfoundland Law Reform Commission Respecting Certain Provisions of The Mechanics' Lien Act*, November 1985 at 8-9.

It was indicated that these problems arise on practically all larger contracts; for example, the construction of hospitals, office towers or hotel complexes. They would be especially evident on such projects as a Lower Churchill Development and the construction of an electrical intertie between Labrador and the Island of Newfoundland.

We indicated in our *Working Paper* that problems of a similar nature were considered in *The Saskatchewan Committee Report*.[78] That Committee recommended, and the legislature subsequently implemented, a procedure which would allow the early release of holdback on contracts, the value of which exceeded 25 million dollars. Section 46 of the *Builders' Lien Act* (SS. 1984-85-86, B-7.1) reads:

> 46(1) Notwithstanding sections 43 and 44 [provisions relating to substantial performance] but subject to section 38 [provision relating to holdback trust account] and subsection (3) of this section, where:
>
> (a) the contract price is in excess of $25,000,000 or any greater amount may be prescribed;
>
> (b) the contract provides for a completion schedule longer than one year;
>
> (c) no claim of lien is registered; and
>
> (d) notice of early release of holdback is given and posted in the manner provided for the giving and posting of a certificate under subsection 41(2);
>
> each payer on the contract and any subcontract shall, following each yearly anniversary, if the money is otherwise due and payable under the contract or subcontract, without jeopardy, make payment of the amount that has been required to be retained, calculated as of the day of each yearly anniversary of the day services of materials were first provided, 40 clear days after the day notice of early release is given and posted.
>
> (2) Whether a contract price is in excess of $25,000,000 or any greater amount as may be prescribed, is to be determined as of the day of execution of the contract, and not as a result of any amendments to the contract.
>
> 3) Where the unexpired term of the contract is less than one year from the last anniversary date of the contract sections 43 and 44 apply *mutatis mutandis* to the contract.

Saskatchewan is the only Canadian jurisdiction with a provision of this nature in its mechanics' lien legislation. Conversations with appropriate officials in that province lead us to believe that the procedure is working well there.[79]

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78 *The Saskatchewan Committee Report* at 171-173.

79 In particular conversations with Mrs. Georgina Jackson, who served as Secretary to The Special Advisory Committee to the Minister of Justice on Builders' Liens, which Committee authored *The Saskatchewan Committee Report*.

We took the position in our *Working Paper* that a mechanism allowing for the early release of holdback on large contracts would be beneficial in this Province. The Newfoundland and Labrador Construction Association thought otherwise.

> The holdback on large contracts provisions are unnecessary and it is the position of the Association that this mechanism should not be incorporated into *The Mechanics' Lien Act*.
>
> It must be noted, however, that if the commission persists in recommending the elimination of Sections 13(2)-13(4), then the holdback on large contracts provisions must be adopted. It is essential that there remain some provision for early release of the holdback.[80]

The Commission believes that this criticism misses the mark. The mechanism for the release of holdback on certified subcontracts might, in the case of a very large job, not be susceptible of application for a period of great duration, exceeding one year. This would result in funds being tied up for an unduly long period of itme as indicated in the Brief from Newfoundland and Labrador Hydro. In any event, our information is that the certification of completed subcontracts occurs with less frequency than one would wish. Though we have expressed the hope that under new reform legislation this will change, we continue to believe that provision should be made in any case for the specific problem which Newfoundland and Labrador Hydro has identified. It may well be that projects of the magnitude intended to be caught by this provision will not be great in number. Where they do occur, however, we believe that a mechanism should be in place to provide for the expeditious flow of contract moneys throughout the construction pyramid. We confirm our *Working Paper* recommendation. We confirm also our baseline figure of $20 million, which amount should be capable of being increased from time to time by the Lieutenant Governor in Council.

The Commission recommends:

20. A provision permitting the release of holdback on contracts, the value of which exceeds 20 million dollars (or such greater amount as may be prescribed) on the yearly anniversary of when services or materials are first provided should be incorporated into the mechanics' lien law of this Province. Section 45 of *The Builders' Lien Act*, SS. 1984-85-86, B-7.1, with appropriate amendment, is a suitable model for such a provision.

6. Limitation Period

Unless protected or preserved, the lien has but a limited life. It arises immediately the first nail is driven or the first work is done but will expire unless preserved by registration and perfected by commencing action within

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80 Brief Respecting Working Paper on The Mechanics Lien Act, (October, 1988), at 4.

the appropriate time frames. Sections 13 and 23 of this Province's *Mechanics' Lien Act* establish the lien preservation period in this jurisdiction. Generally a claim for lien may be registered at anytime during performance of the work or within thirty days after completion or abandonment thereof. Where registration of the claim for lien, or service of the notice of the claim where the lien does not attach to the land, is not effected within the statutory period, the lien expires. Further, if it is to subsist, a preserved lien must be perfected. Pursuant to subsection 25(1) of the Act every lien for which a claim is registered will cease to exist unless within ninety days after the work has been completed or the materials have been placed or furnished, an action is commenced to realize this claim and a certificate of action is registered in the Registry of Deeds for the Province.[81] The limitation periods imposed by the statute are interpreted strictly. The mechanics' lien, as indicated earlier, is entirely a statutory right. Being a creature of statute, the lien must live out its existence in accordance with the enactment's express terms. Because there is no provision in the legislation which allows for revival, once it has expired the lien cannot be restored or revived.

Review of the lien-preservation/holdback-retention periods across the country is instructive. We have seen in section 2 of this Chapter that the trend in other common law provinces is toward a lower rate of holdback. In contradistinction, there appears to be a general trend towards increase in the lien-preservation/holdback-retention period. Current statutory retention periods together with rates of holdback in common law jurisdictions throughout Canada are set out in a table on page 62 of this report. It will be seen that of the nine common law jurisdictions, Newfoundland is the Province with the shortest lien-preservation/holdback-retention period. In its 1979 *Report on Mechanics' Liens Legislation in Manitoba*, the Manitoba Law Reform Commission recommended that the thirty day period operative in that jurisdiction be increased to forty days.[82] This recommendation was subsequently implemented in section 24 of *The Builders' Lien Act*, S.M.

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81 This normal rule is subject, however, to the doctrine of "sheltering," pursuant to which a lien claimant may perfect his lien in certain circumstances, without commencing a separate action or registering a certificate of action, by sheltering under the certificate of action of another lien claimant. Subsection 31(7) of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, states:

> (7) Any number of lien claimants claiming liens on the same land may join in an action, and an action brought by a lien claimant shall be deemed to be brought on behalf of himself and all other lien claimants.

The doctrine of sheltering is intended to preclude the necessity of a multiplicity of actions; a lien action thus becomes a class action. For an account of the circumstances under which the doctrine may be used, see *Brousseau* v. *Muircrest Investments Ltd. et al.* (1977), 15 O.R. (2d) 145. See also *E & J Electric* v. *Littlejohn* (1979), 23 Nfld. & P.E.I.R., 520 (Nfld. Dist. Ct.); and *Crawford* v. *Hesselink* (1958), 15 D.L.R. (2d), 294 (Nfld. T. D.).

82 *The Manitoba Report* at 129.

1980-81, c. 7/B.91. In Saskatchewan[83] and Ontario[84] statutory periods of thirty-seven days have been increased to forty clear days and forty-five days respectively. In each case, the reason behind the extension seems to be recognition of contemporary commercial reality. The *Manitoba Report* stated:

> According to our co-directors the historical basis for the present 30-day time requirement was that credit granting originally was based upon 30-day credit terms. It was however their understanding that the industry today operated on extended periods of credit and that 60 and 90 day credit terms are now more the rule than the exception. In addition, the co-directors recognized the present influence and effect of the computer in the bookkeeping of many firms. According to their research, invoices are frequently not remitted by creditors to the parties concerned until the expiration of one calendar month following the month in which the charges for labour and/or materials and/or services were incurred. On many occasions delays were found to extend as long as 60 days.[85]

Present credit granting and bookkeeping practice would appear to warrant a period greater than thirty days.

HOLDBACK REQUIREMENTS

Province	Rate of Holdback	Period of Retention
Alberta	15%	45 days
British Columbia	10%	40 days
Manitoba	7.5%	40 days
New Brunswick	20% up to $15,000; 15% over $15,000	60 days
Newfoundland	10%	30 days
Nova Scotia	10%	45 days
Ontario	10%	45 days
Prince Edward Island	20% up to $15,000; 15% over $15,000	60 days
Saskatchewan	10%	40 clear days

83 S.S. 1984-85-86, B-7.1, s. 49.
84 S.O. 1983, c. 6, s. 31.
85 *Supra*. n. 81 at 87-88.

How long should the period be? In our *Working Paper* we suggested extending the existing lien preservation/holdback retention period to 45 days. We reasoned that a 45-day period would alleviate to some extent the practical necessity of often filing a lien before payment is due, while at the same time not delaying excessively release of the holdback. Undue delay in release of the holdback would increase project cost. A 45-day period was acceptable to the majority of our respondents. However, the Commission received a well articulated request from the Atlantic Building Supply Dealers Association that the period be lengthened to 60 days. That Brief said:

> What is an adequate holdback period? The Commission suggests 45 days, apparently in an attempt to balance the interests referred to at page 78 of the Working Paper. Is, however, the balance satisfactory if the initial purpose of creating a longer retention period is not met? It is the view of ABSDA that a 45 day period will not meet its members' needs.
>
> Again at page 78 of the Working Paper, the Commission recognizes "the normal 30 day net accounting period" and that the present scheme "often results in the filing of a lien before payment is due". In Ontario it is accepted practice for a lien to be filed before payment is due. Such is not the case with respect to building supply dealers in Newfoundland and the other Atlantic Provinces. The placing of a lien is taken as a personal slur by the contractor/debtor. The following comment from a Newfoundland member of ABSDA puts the matter succinctly:
>
> Most people expect to get 30 days credit which makes it impossible to place a lien. If you were to place a lien before the 30 days the reputation of the (dealer) is shot and customers will stay away from it.
>
> Thirty days is clearly inadequate - will 45 days be much better? With computerized accounts, statements are printed at the end of each month. A receivable remains current for the first month and only shows "over 30 days" at the end of the following month. That is, supplies purchased on September 2nd would show as current at the end of September and would not show as "over 30 days" until the end of October. Not only would 30 days have passed, but 45 days as well. Forty-five days is not an adequate period for the account to become overdue, let along to allow the retailer to attempt collection prior to the expiry of the holdback period.[86]

The suggestion is made that a lien preservation/holdback retention period of 60 days would more adequately meet the needs of suppliers and would be more in line with the other Atlantic provinces.

> ABSDA requests that the Commission reconsider the holdback period. In striking the balance between protecting the trades and suppliers against the cost of the project, it is suggested that the retention period could be

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86 *Brief of the Atlantic Building Supply Dealers Association on the Working Paper on The Mechanics' Lien Act* (October 1988) at 2.

made effective with minimal impact on project cost. While cogent arguments could be made for a 75 or 90 day holdback period, the retail building supply dealers of Newfoundland recognize the trade off involved. Nothing less than a 60 day period will, however, afford the members of ABSDA any real protection. Even at that there is considerable risk involved as a 60 day account is not an old one and on computer accounting an account showing "over 30 days" for the first time could be, in fact, as old as sixty two days. Furthermore, a 60 day period provides little time to attempt collection prior to taking the perceivedly draconian action of placing a lien. Nevertheless, a 60 day period would be far better than the present 30 day period. The 45 day period recommended by the Commission, in the Atlantic Canada context at least, has more flaws associated with 30 days than virtues associated with the 60 day period urged here. New Brunswick and Prince Edward Island have 60 day periods of retention.[87]

It can be stated with some certainty that General Contractors in this Province would oppose a 60 day period. In its Brief in response to the Commission's *Working Paper* Seabord Construction said:

> As long as cash is involved in the holdback provisions, the holdback period should be kept to an absolute minimum and 30 days is the most that should be considered. If other forms of holdback are utilized [eg. labour and material bonds, performance bonds, etc.] the period becomes less important.[88]

We indicated in our *Working Paper* that the choice of a limitation period is always to some extent, arbitrary. Reasonable persons can and do disagree as to what is appropriate and views differ at different levels within the construction pyramid. Though the Commission is sympathetic to the position put forward on behalf of supply dealers, we note that their case is somewhat overstated. In a computerized accounting system where statements are issued at the end of each month it is only the supplies purchased during the first two weeks of any month that are, in the worse case scenario, not caught by the 45 day period. There is no doubt that a computerized accounting system could be devised to monitor accounts on a daily basis and to identify those that have reached the 30 day watermark. The unspoken argument appears to be that to put such a system in place would be cost prohibitive.

The question which the Commission must answer is whether the protective benefits associated with a longer lien preservation period outweigh the costs associated with the concomittant longer holdback retention period. We are not convinced that they do. We continue to believe that the 45 day period proposed in our *Working Paper* achieves an equitable balance between the interests of protection and the necessity of not hindering unduly the flow of

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87 *Ibid.* at 2-3.
88 *Brief on the Working Paper Respecting Mechanics' Liens* (October 1988) at 5.

finances down the construction chain. The period proposed already extends the present period by fifteen days. A sixty day period would in our view be too far out of step with the expectations of other parties within the pyramid. We confirm our *Working Paper* proposal. We confirm also the ninety day period for commencing action set out in subsection 25(1) of the present Act, as this appeared acceptable to all parties within the pyramid.

The Commission recommends:

21. The Province's lien legislation should be amended so as to provide for a lien-preservation/holdback retention period of 45 days.

22. For work, services or materials supplied *before* the date of substantial performance of the main contract, the lien preservation period should expire upon termination of the forty-five day period following the earliest of: (a) in the case of a contractor: (i) publication of the certificate in the Gazette; (ii) publication of notice in the Gazette of the yearly anniversary of a contract exceeding 20 million dollars; (iii) the last provision of work services or materials and (iv) the date a subcontract is certified to completed where the services or materials were supplied under or in respect of that subcontract.

23. For work, services or materials supplied *after* the date of substantial performance of the main contract or, in the case of contracts exceeding 20 million dollars, where the unexpired term of the contract is less than one year from the last anniversary date of the contract, the lien preservation period should expire upon termination of the forty-five day period following the earlier of: (a) in the case of the contractor: (i) the date the contract is completed; and (ii) the date the contract is abandoned; (b) in the case of any other person: (i) the date of last supply of services or materials; and (ii) the date a subcontract is certified to be completed where the services or materials were supplied under or in respect of that subcontract.

24. The ninety day period for commencing action as set forth in subsection 25(1) of the present Act should remain unaltered.

7. Securing the Holdback

The question of whether and how the holdback should be secured goes to the heart of the adequacy of the protection afforded by the current legislation. The problem concerns the conceptual or notional nature of present holdback provisions. Section 13 of this Province's *Mechanics' Lien Act* requires that the person primarily liable upon any contract retain the ten percent holdback for a period of thirty days after the completion or abandonment of the work done or to be done under the contract. However, the section does not require that the holdback money be set aside or segregated in a separate fund. The result is that the owner usually defers the cost of borrowing until such time as he is required to pay over the holdback; *de facto* this ten percent operates as an interest-free loan to the owner's benefit. Moreover, since the holdback is essentially conceptual, should the

owner become bankrupt or insolvent, or the contract be abandoned and the land sold, it is possible that the amount representing the holdback will be consumed by the interest which has accrued on any mortgage debt that is prior in time to the mechanics' lien claims. The situation has been summarized thus:

> The holdback represents money already earned by those who have supplied services or materials to a construction project. Despite this fact, very often those persons find that the owner has not set aside this money and that their claim to a lien against the premises is lower in priority to those of other secured creditors of the owner. Although the Act gives constructors a right to enforce their claim against the premises, this right will often be subordinate to the claims of mortgagees. If the value of the mortgage, including accrued interest, exceeds the value of the premises, then the right of the lien claimant against the premises is illusory.[89]

If the holdback is to serve the protective or security purposes for which it was intended, it is necessary that it be secured.

Two means of achieving this end have been devised. Both originated with work preparatory to Ontario's new *Construction Lien Act 1983*, S.O. 1983, c. 6. The first is the interest-bearing trust account. The *Ontario Discussion Draft* of November 1980 recommended that, in the interest of securing the holdback, where the value of the work to be done is $150,000 or more, the owner shall pay the actual amount of the holdback into an interest-bearing trust account, held jointly in the name of the owner and the general contractor, as trustees for the benefit of all persons entitled to liens. The Crown and municipalities were exempt from this provision as security of the holdback was not a problem where these entities were concerned. A $150,000 threshold was imposed so that only larger contracts would be caught. It was reasoned that where the contract price is lower than $150,000 the administrative cost associated with securing the holdback would offset the benefits attained through such security.

This concept was given legislative force by the government of Manitoba. Subsection 24(3) of *The Builders' Lien Act*, S.M. 1980-81, c. 7/B91, provides as follows:

> Payment into holdback account
> 24(3) Where the total price of work to be done, services to be provided and materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section, or, if there is no specific contract price, the actual value of the work to be done, the services to be provided and the materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section the owner shall, as the work is done, the services provided and

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89 *Ontario Discussion Draft Supra* Ch. 1 n. 15 at 13.

the materials supplied under the contract, pay the holdback into a hold back account.

Manitoba Regulation 200/81 set the prescribed amount at $200,000. The *Saskatchewan Report* recommended adoption of a holdback trust account procedure, though it argued that no threshold contract value should be prescribed.

In Ontario, the Attorney General's Advisory Committee for review of the Discussion Draft proposals concluded that a joint trust account mechanism would be neither practicable nor workable on the Ontario construction scene. The Committee opined that the cost of the proposal, in particular, the increased administrative cost, would far exceed its benefits. However, the Committee did agree that there was a need to secure the holdback. Hence, it proposed a second method of attaining this end. The Committee reasoned that since the relative priority between mortgages and liens was the cause of the problem the most satisfactory solution would be to adjust those priorities so as to protect the lien claimant's rights in the premises.[90] This could be achieved *by giving the lien priority over any building mortgage* to the extent of any deficiency in the holdback. The term "building mortgage," which is not found in the Act, but which appears as a marginal sidenote to subsection 80 (2), has been explained as follows:

> A "building mortgage" is one which is taken "with the intention to secure the financing of an improvement." The relevant "intention is that of the lender, and not of the borrower.
> Whether or not a particular mortgage is a building mortgage is a question of fact. In this regard, it should be noted that s. 39(2) of the Act authorizes any person having a lien, or any beneficiary of a trust under Part II, to require a mortgagee to provide "sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of an improvement." Further evidence may be garnered from the original mortgage application documentation, as well as the mortgagee's commitment letter.[91]

Where the mortgage is a building mortgage the lien has priority, *regardless of the order of registration* of the building mortgage and the lien, to the extent of any deficiency in the holdback moneys required to be retained by the owner. Subsection 80(2) of the *Construction Lien Act, 1983* reads:

> (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required

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90 *Ontario Committee Report supra* Ch.1 n. 15 at xxxvi ff.
91 Kirsh *supra* n. 1 at 167

to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

The effect of this provision is to protect lien claimants, to the extent at least of the value of the holdback. Where the interest of the owner in liened property is sold by the mortgagee (who is found to be a building mortgagee) or by a lien claimant who has pursued his remedy under the Act, and sufficient funds are not realized to satisfy both the statutory holdback and the total amount owed under the mortgage, the lien claimant will have priority against the moneys realized from the sale up to the value of holdback; viz. 10 percent of the value of the work in place.[92]

Because the holdback represents money already earned by those who have enhanced the value of the land through the provision of work, services or material, it is important that it be secured for their benefit. The question to be determined is whether either of the two methods outlined is appropriate for adoption in this jurisdiction. The *Saskatchewan Report*, as noted, considered this question. Though attracted to the second solution, the Saskatchewan Committee opted ultimately for the first as it believed that this approach had the practical and psychological edge. The joint holdback trust account was apparently already in use on some projects in that Province. Moreover, it reasoned that where such a fund did exist, knowledge of its existence instills confidence in potential claimants that the holdback would be paid to them. By comparison, realignment of priorities might adversely affect credit financing on construction projects, would require a greater intervention by the financial community into the paying out of the holdback, and might slow its release. Further, in the event of default before completion, questions as to the amount of the holdback, determination of the work to date and the consequent size of the claim would be more difficult than under a system where accounts were kept and the fund segregated from the outset. On balance, the *Discussion Draft* approach, as given legislative force in Manitoba, was preferred.

In our *Working Paper*, this Commission indicated that tentatively we favoured the Manitoba/Saskatchewan approach.[93] We recommended adoption of a joint holdback trust account mechanism and proposed that it apply to all contracts irrespective of dollar amount, excepting only contracts where the Crown or a municipal corporation was the owner of the property. We did so in the hope of eliciting comment from our respondents. We indicated that, as the issue of how the holdback should be secured had not been raised by any of the parties who made submissions to us during our preparatory work, we believed it would be useful for purposes of discussion to present

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92 Cadsby, "Mortgage Lenders and the Construction Lien Act," in Kirsh *supra* n. 69 at 158 ff
93 NLRC-WP3 (April 1988) at 86.

the options available and to take a stand, if only tentatively, for purpose of vetting the protection issue in all its aspects.

The Commission's *Working Paper* discussion engendered considerable response. Though there was general agreement that the holdback should be secured the joint holdback trust account proposal received mixed reaction. Comments were generally of two sorts. First, there were those who favoured the general idea of the holdback trust account but questioned some of the detail. The principal concerns expressed by this group related to the commission's recommendations respecting distribution of interest on the holdback trust account and the exemption to be accorded the Crown and municipal corporations.[94] Second, there were those who rejected the idea of the holdback trust account mechanism altogether and suggested that a revised priority approach as adopted in Ontario's *Construction Lien Act, 1983* would be more appropriate. The concerns of this group were of a more serious and fundamental nature. The Brief from the Law Society of Newfoundland was the strongest contender in this category. Rather than summarize the argument therein put forward, we believe it would be useful to quote from the Brief in some detail.

The Law Society Brief stated its objections to the Holdback Trust Account Mechanism as follows:

> It is felt that the Commission's proposal is not workable. For small contracts, it is highly likely that such a requirement would simply be ignored by all parties. Small construction firms lack the sophistication to deal with such a requirement. It is unlikely that owners and contractors on small projects would actually establish such accounts. Experience indicates that small contractors only worry about the mechanic's lien provisions when they have trouble getting paid.
>
> The requirement may be useful on larger contracts. However, as the Commission notes, it is the smaller contracts where the holdback is least likely to exist.
>
> In addition, such a proposal adds to the administrative cost of construction and adds complexity to the mechanic's lien mechanism.
>
> The Ontario approach is part of the priorities established under Part IX of the Ontario Statute. Section 80(2) in essence provides that the lien will have priority over a mortgage taken out to finance an improvement to the extent of any deficiency in the holdback. Consequently, to protect its interests, a mortgagee providing construction financing must take steps to ensure that the holdback exists. In practice in Ontario, one of two approaches is adopted. If the mortgagee is comfortable with the financial strength and integrity of the owner, the mortgagee simply secures an appropriate covenant that the owner will maintain the requisite

94 Eg. The Newfoundland and Labrador Construction Association; The Newfoundland and Labrador Construction Association: General Contractors' Section; Seabord Construction.

holdback. In other cases, the mortgagee will retain and set aside ten (10%) percent holdback to ensure that their interests are adequately protected.

> We see no reason why the priorities, at least as between lien claimants and mortgagees, contained in the Ontario Act ought not to be adopted. While the . . . [regime established under subsection 16(1) of Newfoundland's present Act] . . . may have the benefit of simplicity, the Ontario lien-mortgage sections (in particular Section 80) strike a more appropriate balance in ensuring that contractors receive the benefits of their labours.
>
> Financial institutions have worked with the Ontario statute for a number of years. Most finanacial institutions operating in Newfoundland also operate in Ontario. They therefore have existing experience with this approach. It is difficult to see why changing the priorities in line with the Ontario model should create financing difficulties. Indeed, as the Commission correctly notes . . ., the new provisions appear to be working well in Ontario. There was some initial concern following the introduction of the legislation. However, financial institutions and the practicing Bar quickly adapted to the new legislation. There have been only minor changes in existing mortgage practice for lawyers as a result of the new legislation.[95]

It is important that the mechanism adopted to secure the holdback be effective, apply on all jobs irrespective of size and not impose an excessive administrative burden. The contention is that amending the priority regime set forth in Section 16 of the present Act in such a manner as to give the lien priority over a building mortgage to the extent of any deficiency in the holdback would achieve these ends in a more effective manner than the joint holdback trust account mechanism.

The Commission has given the argument presented in the Law Society Brief careful consideration. We indicated in our *Working Paper* that security of the holdback is most often a problem on small jobs. There can be no doubt as this Brief points out, that the administrative infrastructure that a properly maintained holdback trust account would require would be least likely to exist on just these jobs. This was one of the factors which led the Attorney General's Advisory Committee which reviewed the *Discussion Draft* proposals to reject the joint holdback trust account mechanism.[96]

We stated in our *Working Paper* that our choice of the trust account method for securing the holdback was tentative. The adverse comment received respecting the recommendations regarding division of interest and the exemption to be accorded the Crown and municipal corporations

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95 *Response of The Special Committee of The Law Society With Respect of The Working Paper by the Newfoundland Law Reform Commission on The Mechanics' Lien Act* (November 1988) at 2-3.

96 *Supra* n. 89.

confirms the experience in other jurisdictions that the trust account mechanism is fraught with administrative difficulties presenting grounds for much dissatisfaction.[97] By comparison, a realignment of priorities along the lines of section 80 of the Ontario Act has the benefit of administrative simplicity and universality of application. On reflection we are persuaded that a revised priority regime as provided for in section 80 of the *Construction Lien Act, 1983* is a simpler and more effective means of achieving the end of a secured holdback. We are prepared to recommend its adoption in this Province. We believe further that such a regime should be accompanied by appropriate "right to information" provisions which would enable a lien holder to determine whether any mortgage on the premises liened was taken by the mortgagee for the purpose of financing the making of the improvement. Subsection 39 (2) of the *Construction Lien Act 1983* provides an appropriate model for such a provision.

The Commission recommends:

25. The holdback should be secured by a realignment of priorities under subsection 16 (1) of the *Mechanic Lien Act* RSN 1970 C229 in such a manner that the lien is to rank in priority over any building mortgage to the extent of any deficiency in the holdback.

26. Right to information provisions similar to section 39 of Ontario's *Construction Lien Act, 1983* should be included in any new lien legislation enacted in this Province. This provision should enable the person having a lien to require a mortgagee or unpaid vendor to provide sufficient details concerning any mortgage on the premises to enable him to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement.

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97 *The Ontario Committee Report supra* ch 1 n 15 at 190-193.

CHAPTER 4

THE CROWN

1. Introduction

At law, the word "Crown" is a term of art. Subsection 26(1) of this Province's *Interpretation Act*, R.S.N. 1970, c. 182, provides in part:

> 26. (1) In an Act or regulation the expression ...
>
> (m)... "the Crown" means the Sovereign of the United Kingdom, Canada and her other Realms and Territories, and Head of the Commonwealth.

Notwithstanding this provision, it is doubtful that a reference to the Crown in a statute of the Province can be any more than a reference to the Crown *in right of* the Province. As a general rule, it appears clear constitutionally that the Crown in right of Canada "...cannot be deprived of its prerogatives by provincial legislation, and a *fortiori*, provincial legislation cannot competently deal with or subject federal public property to provincial regulation..."[1] Therefore, unless the context indicates otherwise, for the purposes of this *Report* the word "Crown" may be understood to mean the "Crown in right of Newfoundland." For practical purposes, this expression is synonymous with the Government of the Province. Hogg states in this regard as follows:

> In Canada, and in other Commonwealth countries which recognize the same Queen as the formal head of state, the state (or government) is commonly referred to as "the Crown". This usage dates from earlier times when all powers of government were vested in the monarch, and were exercised by delegation from the monarch. One could argue, with some support from the language of the B.N.A. Act, that this is still technically true of Canada today, but the theory bears no resemblance whatever to the actual lines of authority within Canadian governments. Nevertheless, the *Crown* continues to be used as *a convenient symbol for the State*, and we commonly speak of the Crown expropriating a house, of the Crown being sued for breach of contract, of the Crown being bound by a statute. In all of these propositions the state or the government could as well be used instead of the Crown.[2]

In this chapter, the two words *Crown* and *Government* are used interchangeably throughout.

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1 Laskin, *Canadian Constitutional Law* 3rd ed., p. 554.
2 Hogg, *Constitutional Law of Canada* 1st ed., at p. 164.

The mechanics' lien is entirely a creature of statute. The received wisdom in respect of the applicability of statutes to the Crown generally has been stated as follows:

> One of the basic prerogatives of the Crown at common law is the rule that the Crown is not bound by statute unless named or by necessary implication. The rule originated in the Middle Ages. Professor Street suggests that the first case on this question was decided in 1457 by Ashton J. who held, *quant un remedy soit fait pur un statute ce ne serra entendu en contre le roy s'il ne soit pas expressement reherse*. The notion behind the rule seems to be that legislation is presumably enacted only for subjects.[3]

In this Province the scope of the common law rule appears to be restricted by section 13 of *The Interpretation Act*, R.S.N. 1970, c. 182, which provides that no statute "... is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby." This would appear to deny the possibility of a statute's application *by necessary implication*. Though he did not specifically advert to the question, in *Kitchen Kabinets Ltd.* v. *Pinsent Construction Co. Ltd.* Furlong C.J.N. indicated that no Act of the legislature affects the Crown or any Agent of the Crown unless it is expressly directed to apply.[4]

The privileged status conferred upon Government and its agents by virtue of the principle of Crown immunity is the source of widespread dissatisfaction. One writer has noted: "The 'Crown' has become a shelter for all kinds of inequitable dealings, which, save for the prerogative, would soon receive short shrift in the courts."[5] In its 1972 *Report on Civil Rights: Part I Legal Position of the Crown*, the Law Reform Commission of British Columbia recommended that in most instances the laws which are applicable in actions between subject and subject should also be applicable in actions between the Crown and a subject.[6] More recently, in its study of *The Legal Status of the Federal Administration*, the Law Reform Commission of Canada noted:

> The legal position of the Crown has its roots in a period when a different logic applied to relations between the State and the individual. Today,

3 Law Reform Commission of British Columbia, *Report on Civil Rights: Part I Legal Position of the Crown*. (1972) at p. 63.
4 (1974) 6 Nfld. & P.E.I.R. 426 at 427 (Nfld SCCA).
5 W.P.M. Kennedy, "Suits by and Against the Crown," (1928) 6 Can. Bar Rev. 329 as quoted in *supra* fn. 3 at 6.
6 *Ibid.* at 5.

> the Crown continues to represent a legal reality endowed with many privileges, powers and immunities that are difficult to reconcile with the ideals of a society concerned about equality and democracy.[7]

Modern conditions, contemporary notions of government accountability and responsibility and the argument from fairness and equality of treatment in light of the *Charter of Rights and Freedoms* all point to the need for a rethinking of the traditional approach.

2. The Mechanics' Lien Act

There is no express statement in this Province's *Mechanics' Lien Act* to the effect that the Crown is bound thereby.[8] Submissions received by the Commission during our study were almost unanimously to the effect that the legislation should be applicable to Her Majesty in right of the Province. Exclusion of the Crown has been stated to be theoretically questionable. Berman and Waitzer point out as follows:

> The obvious economic theory underlying mechanics' lien legislation finds its source in Bentham's assertion that society must secure to each man the results of his labour in order to encourage men to work. An additional economic premise for mechanics' lien schemes is that the security they afford brings about lower costs. Alternatively, it has been suggested that the statutory framework results in increased competition by reducing the capital needed by principal contractors. Such competition will, presumably, result in lower prices which may, however, be offset by a resultant increase of failures in the construction industry.
>
> It is not clear, assuming such utilitarian premises, why the statutory framework exempts particular types of construction jobs, such as construction work for governments. Even if it is felt that there is no need to stimulate subcontractors, materialmen or workers on such jobs, the failure to protect these participants would seem inconsistent with the theory of property rights flowing from the workmen's labour.[9]

In a Brief submitted prior to the preparation of the Commission's *Working Paper*, The Newfoundland and Labrador Construction Association indicated

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7 Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (1985) at 2.

8 Although the *Mechanics' Lien Act* contains no general provision binding the Crown, the Act may nonetheless bind an agent of the Crown where it is expressly stated to apply. See, for example, *The Newfoundland Labrador hydro Act, 1975*, S.N. 1975, No. 3, S.SS. 4(6) and 23B(a) which state:

s.4
(6) Subject to this Act, the Corporation is an agent of Her Majesty in right of the Province.
23B. Notwithstanding that the Corporation is an agent of Her Majesty in right of the province,
(a) *The Mechanics' Lien Act* applies in respect of the Corporation and all property to which title is vested in the name of the Corporation;...

9 Berman and Waitzer, "Which Way to Lien?" C.B.L.J. 470 (1980-81) at 476.

that of the 85 responses the Association received from a general inquiry directed to its members, 81 were strongly of the view that the Act should be binding upon the Crown.[10] Indeed, it was pointed out that present government practice is anomalous and contradictory; for while, current policy is that the Crown and her Agents retain as a matter of course a ten percent holdback on most construction contracts, in the event of bankruptcy or insolvency of the general contractor this holdback is seldom applied to the claims of unpaid lien holders. Rather, because the Crown is exempt from the Act the moneys withheld go to the benefit of insurance companies who, because they have performance bonds on the job, are subrogated to the rights of the owner. The funds are then generally applied not to the satisfaction of outstanding liens but to the completion of the project, an unauthorized use in the case of those bound by the legislation.[11] It was argued that this state of affairs was inconsistent with the theory of property rights underlying the statute and was in need of rectification. To the extent possible, the position of the Crown as owner should be assimilated to that of the private owner.

We recommended in our *Working Paper* that the Crown be bound by *The Mechanics' Lien Act*. In recommending this, however, we indicated that it was not our intention that the estate or interest in the lands of the Crown should be lienable and subject ultimately to sale. We believed that such would be against public policy and public convenience. Rather, we proposed that the practice provided for in section 6 of the present Act be made of general application. This would mean that in the case of the Crown, the lien would not attach to the land but would constitute instead a charge upon the holdback. This proposal drew the following comment from the Newfoundland and Labrador Construction Association:

> While the Association is pleased with the recommendations, at Page 98 of The *Working Paper*, that the Crown be subject to the mechanics' lien process, it regrets that such liens' are not to attach to the Estate of the Crown. The Association is unconvinced by the argument that to permit such attachment would be unworkable and would further be contrary to public policy. Many, if not most Crown assets can and should be subject to the mechanics' lien process. To reiterate a point made earlier in this Brief, while it is obviously important that mechanics' lien legislation be "clearly ascertainable" and well organized, the goal of clarity should not obscure the greater aim of protecting those working in the construction industry. The recommendation that liens not be permitted to attach to the Estate or interests of the Crown goes against this greater aim.[12]

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10 *Brief of the Newfoundland and dLabrador Construction Association Respecting the Newfoundland Government's Review of the Mechanics' Lien Act*, R.S.N. 1970, c. 29 (December 1984) at 3f.

11 *The Mechanics' Lien Act*, ss. 13(9). The case most often referred to by presenting parties in this context was: *Canadian Pittsburgh Industries v. Crown Construction Limited and the Workers' Compensation Board of Newfoundland and Labrador* (1979) 24 Nfld. & P.E.I.R. 391 (Nfld. District Court per Adams DCJ, as he then was).

12 *Brief Respecting Working Paper on The Mechanics' Lien Act*, (October 1988) at 4.

We were surprised by this comment. It was out of step with other views received. For example, The St. John's Board of Trade noted that "[I]t is theoretically very difficult to effectively lien Crown projects... Who other than the Crown, for instance, would want to have possession of a hospital...?"[13] Rather, the vast preponderance of representations received prior to our *Working Paper* and in response to it, favoured adoption of provisions similar to sections 1, 3, 16 and 21 of Ontario's *Construction Lien Act, 1983*, S.O. 1983, c. 6, which provide that the legislation is binding upon the Crown but in such a manner that the lien does not attach to the interest in the land but constitutes instead a charge upon the holdbacks required to be retained under the Act. The philosophy underlying these provisions parallels that reflected in section 6 and subsection 13(5) of the Newfoundland legislation respecting public streets, roads and highways. The majority view was that general amendments to this effect would further the Act's protective ends while avoiding public policy conflicts. The Commission is not persuaded by the comment to the contrary in the Brief from the Newfoundland and Labrador Construction Association. We confirm our *Working Paper* recommendations that where the Crown is an *owner* within the meaning of the *Mechanics' Lien Act* the lien should not attach to the estate or interest of the Crown in the premises but should create instead a charge upon the holdback.

The relevant provisions of the *Ontario Construction Lien Act, 1983*, sections 1, 3, 16 and 21, are as follows:

> 1. (1) In this Act,
>
> 6. "Crown" includes a Crown agency to which the *Crown Agency Act*[14] applies;
>
> 15. "owner" means any person, including the Crown, having an interest in a premises at whose request and,
>
> i. upon whose credit, or
> ii. on whose behalf, or
> iii. with whose privity or consent, or
> iv. for whose direct benefit,
>
> an improvement is made to the premises but does not include a home buyer;

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13 *Brief of the St. John's Board of Trade to the Newfoundland Law Reform Commission* (December 1984).

14 *The Crown Agency Act*, R.S.O. 1980, c. 106, provides as follows:

> 1. In this Act, "Crown Agency" means a board, commission, railway, public utility, university, manufactory, company or agency, owned, controlled or operated by Her Majesty in right of Ontario, or be the Government of Ontario, or under the authority of the Legislature of the Lieutenant Governor in Council. R.S.O. 1970, c. 100, s. 1.
>
> 2. A Crown agency is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty. R.S.O. 1970, c. 100, s.2.
>
> 3. This Act does not affect Ontario Hydro. R.S.O. 1970, c. 100, s. 3; 1973, c. 57, s. 19.

3. (1) Subject to section 16 (where lien does not attach to the premises), this Act binds the Crown but does not apply in respect of a contract as defined in the *Ministry of Transportation and Communications Creditors Payment Act*, and to which that Act applies.

(2) Section 7 of the *Proceedings Against the Crown Act* does not apply in respect of an action against the Crown under this Act.

16.(1) A lien does not attach to the interest of the Crown in a premises.
(2) Where an improvement is made to a premises in which the Crown has no interest, but the Crown is not an owner within the meaning of this Act, the lien may attach to the interest of any other person in that premises.
(3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is,
(a) a public street or highway owned by a municipality; or
(b) a railway right-of-way,
the lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.

21.The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17(3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Subsection 34(3) of the Ontario Act provides that in instances where the Crown is the owner and the lien does not attach to the premises, the lien is preserved, not by registration as in the normal case, but by giving the appropriate Crown office, as prescribed by regulation,[15] a copy of the claim for lien together with an affidavit of verification. Delivery of a copy of the claim for lien and affidavit must be effected during the supply of services or at any time before the forty-five day lien preservation period runs. These provisions are similar in substance to subsection 23(5) of the Newfoundland *Mechanics' Liens Act* which states:

23(5) Where there is no lien on the land by virtue of section 6, any person who is asserting a claim under subsection (5) of section 13 for work done or materials placed or furnished shall give notice in writing of his claim to the owner, to every person in whose hands are sums retained under section 13 to which his claim may relate and to the municipal authority,

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15 Ontario Regulation 159/83.

if any, in whose area of authority the land is situate within thirty days after the completion or abandonment of the work or the placing or furnishing of the materials.

Where a claim is perfected by commencing action, subsection 3(2) of *The Construction Lien Act, 1983* exempts application of section 7 of the *Proceedings Against the Crown Act*.[16] Hence, in Ontario service of the usual sixty days notice upon the Crown is not a condition precedent to the commencement of the action. In our *Report on Limitation of Actions*, this Commission recommended that the equivalent provision contained in section 23 of this Province's *Proceedings Against the Crown Act*, S.N. 1973, No. 59, together with sundry other thirty day notice provisions contained in a multiplicity of government departmental *Acts*, be repealed.[17] We argued that such provisions offend the principle of equality of treatment, constitute traps for the unwary and in situations where they function as *limitation periods within limitation periods* can work substantial hardship. In the case of mechanics' liens, a thirty or sixty day notice period would obviously severely truncate the limitation periods otherwise applicable under the Act. We believe that any new lien legislation introduced in this Province should contain a provision similar to subsection 3(2) of the Ontario Act exempting application of the sixty day notice requirement provided for in section 23 of Newfoundland's *The Proceedings Against the Crown Act*.

An additional suggestion considered and rejected in our *Working Paper* was the proposal that we qualify the principle that in the case of the Crown the lien should not attach to the land but should operate as a charge on the holdback. It was suggested that the estate or interest in the property of some Crown agencies, notably Crown corporations which operate on a cost-recovery basis, should be lienable and subject ultimately to sale. We indicated in our *Working Paper* that though initially attracted to this suggestion, we determined on closer scrutiny that it would be very difficult to implement and could well lead to considerable confusion and uncertainty. It would

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16 Subsection 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, reads as follows:

> 7. (1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his opinion are necessary to enable the claim to be investigated. R.S.O. 1970, c. 365, s. 7(1); 1972, c. 1, s. 9(7).

17 Section 23 of the *Proceedings Against the Crown Act*, S.N. 1973, no. 59, reads as follows:

> No action shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim in which the name and residence of the proposed plaintiff, the cause of action, and the court in which it is to be brought is explicitly stated.

For a list of provincial statutes, primarily municipal or departmental Acts, contain similar provisions, see NLRC-WP1 *Limitation of Actions* (1985) at 273f. The Commission's position in respect of "Notices of Claim" generally is stated at NLRC-WP1 269f.

require careful differentiation between those Crown Corporations to which the full force of the Act applied and those to which it did not. We continue to be of the view that this would be no easy undertaking. For example, the Newfoundland and Labrador Housing Corporation, which was put forward as one of those agencies that should be subject to the Act in all respects, provides a mixture of services: subsidized and non-subsidized housing. As regards the subsidized housing, at least, we believe it would be against public policy and public convenience to allow a lien claimant to enforce his ultimate remedy of sale. Distinctions within a single body of property which is and property which is not subject to sale is, we think, impractical. After careful consideration, we take the position that simplicity and certainty favour treating all property of the Crown and her agents alike. We regard it as sufficient that the lien constitute a charge upon the holdback.

It might also be noted as regards Crown agencies that we do not have in this Province legislation equivalent to Ontario's *Crown Agency Act*,[18] though definitions and schedules contained in *The Conflict of Interest Act, 1973*, S.N. 1973, No. 113; *The Public Tenders Act, 1984*, S.N. 1984, C. 36, (proclaimed into force November 1, 1987) and *The Newfoundland Public Service Commission Act, 1973*, S.N. 1973, No. 116, do contain some rough guidelines. Rather, the common law test of *the nature and degree of control exercised by the Crown over the particular body* is the determinative criterion.

In *Canadian Pittsburg Industries* v. *Crown Construction Ltd. and The Workers' Compensation Board of Newfoundland and Labrador*,[19] Adams D.C.J. (as he then was) cited Ritchie J. in *Westeel-Rosco Ltd.* v. *Board of Governors of South Saskatchewan Hospital Centre (1976)*, [20] where the learned judge said:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in a paragraph in the reasons for judgment of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R. v. Ontario Labour Relations Board, Ex p. Ontario Food Terminal Board* (1963), 38 D.L.R. (2d) 530, at p. 534, [1963] 2 O.R. 91, where he said:
>
> It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.[21]

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18 See *supra* fn. 14.
19 (1979), 24 Nfld. & P.E.I.R. 391.
20 [1977] 2 S.C.R. 238.
21 *Ibid.* at 342.

It would seem that case by case analysis would be required to prepare anything like a definitive list. Such a task would be quite involved. For example, in *Re Crown Construction Ltd.* (1978 SCTD Nfld. unreported), Goodridge J. (as he then was) held *inter alia* that although Memorial University of Newfoundland was not a Crown agency, it had no estate or interest in its property and therefore was not an "owner" under the *Mechanics' Lien Act*. Preparation of a list of Crown agencies, though such might prove an interesting and useful exercise, is not within our mandate in this study. We do not propose to undertake that task here.

The Commission recommends:

27. The Province's lien legislation, should be amended so as to provide that the Crown is bound thereby. "Crown" should be defined to include a Crown agency.

28. The amending provisions dealing with liens against the Crown should clearly state that where the Crown is an owner within the meaning of the Act the lien does not attach to the estate or interest of the Crown in the premises but constitutes instead a charge upon the holdback. This would have the affect of making Subsection 13(5) of the present Act applicable to the Crown generally.

29. The sixty day notice period contained in section 23 of *The Proceedings Against the Crown Act*, S.N. 1973, No. 59, and the thirty day notice provisions contained in the government department Acts listed at page 275 of this Commission's *Working Paper on Limitation of Actions* (NLRC-WP1) should not apply in respect of an action against the Crown under *The Mechanics' Lien Act*.

CHAPTER 5

THE TRUST

1. Introduction

In British Columbia, Saskatchewan, Manitoba, Ontario and New Brunswick the remedies afforded by the lien against the property and by the holdback are augmented by inclusion within the lien legislation of trust provisions.[1] The effect of these provisions is to supplement the protection which the Act otherwise provides to those who supply the work, services and materials which enhance the value of an improvement. Referring to *The Mechanics' Lien Act* of British Columbia, Locke J. of the Supreme Court of Canada said in *Minneapolis-Honeywell Regulator Co.* v. *Empire Brass Co.*:

> *The Mechanics' Lien Act of British Columbia* has since 1879 afforded to labourers, material men, contractors and others a means of enforcing their claims against the work produced as a result of their efforts or with the materials they have supplied, by filing claims of lien within a defined period and, if default were made, instituting proceedings to realize the amounts payable. S. 19 [now section 2] was apparently designed to provide further security for such persons by providing that moneys received as payments on account of the principal contract or of any sub-contract should, in the hands of the recipients, constitute a trust fund for their benefit.[2]

Subsection 2(1) of *The Builders Lien Act*, R.S.B.C. 1979, c. 40, reads:

> All sums received by a contractor or sub-contractor on account of the contract price are and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractor, Workmen's Compensation Board, workmen, and material men; and the contractor or sub-contractor, as the case may be, is the trustee of all such sums so received by him, and, until all workmen and all material-men and all sub-contractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect

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1 The successive years in which the mechanics' lien trust was introduced in each of these five jurisdictions are as follows: Manitoba--1932; Ontario--1942; British Columbia--1948; New Brunswick--1959; and Saskatchewan--1973.

2 [1955] S.C.R. 694 at 703-704.

thereto, shall not appropriate or convert any part thereof to his own use, or to any use not authorized by the trust.[3]

Though the trust provisions contained in the lien legislation across the country differ in detail, the general intent is essentially similar. The purpose of the provisions, as Macklem and Bristow point out, is to insulate "... the contract funds being paid for the work and materials which create the improvement from the claims of other creditors of persons making such payments, such as might arise as a result of assignments, bankruptcy and statutory liens."[4] *The Saskatchewan Committee Report* amplifies this thought as follows:

> The main purpose for the creation of the trust is to ensure that moneys that are in the construction pyramid for the purposes of the improvement are kept in the pyramid. In this regard, the vehicle of the trust is immensely suited. Monies held by a trustee should not be the subject matter of a garnishee summons or other debt enforcement mechanisms. A trustee who makes an assignment in bankruptcy cannot be divested of money held for his beneficiaries. Similarly, if the trust provisions are drafted succinctly and interpreted correctly, monies in a trustee's bank account cannot be applied to debts which the bank may have against the trustee if the debt does not have its origin in the construction project.[5]

In essence, the trust provisions attempt to protect the funds within any given construction pyramid so as to ensure that the claims of workmen, materialmen and suppliers to the improvement have priority over other claims to the contract money in the hands of the owner, contractor or sub-contractor.

The current Newfoundland statute contains no trust provisions. Nonetheless, counsel in this jurisdiction through the use of such notions as the constructive trust, unjust enrichment and other equitable considerations have sometimes argued that funds held back by an owner are impressed with a trust in favour of unpaid lienholders. Where these arguments have been considered by the Court, however, they have generally met with little success. In *Canadian Pittsburg* v. *Crown Construction*,[6] for example, though it was submitted in the alternative for the Plaintiff that the moneys held back by the owner, the Workers' Compensation Board, "were impressed with an express, implied, resulting or constructive trust for the benefit of the lien

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3 The Law Reform Commission of British Columbia commented upon the provision as follows:
The intention of this provision is to secure to the classes of persons described in the subsection a measure of protection additional to that provided by the ordinary law of contract and by the right, where it exists, to obtain a lien against the owner's interest. The device used to create the additional measure of protection is to make certain classes of persons owners in equity of contract moneys and to give them the rights which the beneficiaries under a trust have against a trustee and anyone into whose hands trust property comes.
See *The British Columbia Report*, *supra* Ch. 1, fn. 15, at 91.

4 Macklem and Bristow, *Construction and Mechanics' Liens in Canada* (5th ed.) at 357.

5 *The Saskatchewan Report*, *supra* Ch. 1, fn. 1, at 3.

6 (1975) 24 Nfld. & P.E.I.R. 391 (per Adams, D.C.J. as he then was).

claimants,"[7] the issue was not addressed as the Plaintiff was held to be successful on its initial and primary argument. In *Re Crown Construction Ltd. (Bankruptcy)*,[8] on the other hand, the trust argument was considered and held on the facts of the case not to apply. Goodridge J. (as he then was) said:

> If I were to find the existence of a trust outside the provisions of the Mechanics' Lien Act (for, in this case, there is no claim under the Mechanics' Lien Act and there can therefore be no trust under that Act) I would have to find that the funds in the hands of the owner belong to the subcontractors. There is nothing outside the contracts which would permit me to make such a finding and there is nothing in the contracts providing for the same.
>
> In the circumstances I must reject the argument.[9]

An appropriate case wherein full and sympathetic consideration to the trust argument might be given has yet to occur.

The ministerial reference to the Commission on the *Mechanics' Lien Act* expressly requested that a determination be made as to whether trust provisions similar to those contained in Ontario's new *Construction Lien Act, 1983* might beneficially be included in this Province's lien legislation. The consensus amongst those to whom we put the question and who made representations to us was favourable. The general perception appeared to be that implementation of such provisions would help ensure that funds received by the owner intended to finance the project and payments made or that were owing to contractors or subcontractors under the contract would not be diverted to other uses or used to satisfy other claims, but would actually go to benefit those who enhance the value of the improvement through the supply of work, services and materials. The brief received on behalf of the Newfoundland and Labrador Construction Association stated as follows:

> The Executive of the Construction Association are in favour of these added protections and believe that similar legislation should be implemented in our Province. Many situations at present which cause hardship to those providing services are where payments are made to contractors and/or sub-contractors and banks thereafter step in and under general assignments of book debts or other security take the funds. Most situations therefore involving breach of trust involve the lien claimants and the banker of an insolvent owner, contractor or sub-contractor. These trust provisions defeat the general assignment of book debts to prevent the inequitable result of funds being diverted. The Bank can have no higher right to the funds than the insolvent owner/contractor and

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7 *Ibid.* at 395.
8 1978 No. 835A, Supreme Court Trial Division (1979) unreported.
9 *Ibid.* at 25-26.

thus takes the receivables subject to the imposed trust conditions having therefore to disburse the funds down the line. The Construction Association are extremely supportive of adding this type of protection to our lien legislation and feel that the Ontario provisions or similar such provisions should be examined carefully with a view to implementation of the same.[10]

Not all briefs received were supportive of the idea of the inclusion of trust provisions, however. The brief of the Newfoundland Branch of The Canadian Bankers Association struck a strong contrary note.[11] It pointed out that in light of their relative newness and the uncertainty surrounding their scope it was difficult to assess and evaluate the full effect of the Ontario provisions. The Association was opposed to the inclusion of any provision, whether modelled on the Ontario legislation or otherwise, the effect of which might be to increase the obligations and potential liability of its members. It suggested that caution should prevail and that serious thought should be given to devising an entirely new and more economically efficient structure for guaranteeing the legitimate contractual claims of those who participate in construction projects.[12]

In Chapter I above we argued that abolition of *The Mechanics' Lien Act* and its immediate and unqualified replacement by a new and fundamentally different regulatory regime was not warranted at this time. We agreed with the majority view put before us that the protection provided by the existing system of rights and obligations should be retained.[13] A typical response by the other presenting parties to the position put forth in the ***Bankers' Association Brief*** was as follows:

[T]o consider abandoning or repealing mechanics' lien legislation which is the thrust of their submission would be to fly in the face of all other

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10 *Brief of the Newfoundland and Labrador Construction Association Respecting the Newfoundland Government's Review of the Mechanics' Lien Act, R.S.N. 1970, c. 229* submitted December 10, 1984, at 9-10.

11 *Comments On Proposed Changes To The Newfoundland Mechanics' Lien Act*, The Canadian Bankers' Association, Newfoundland Branch, June 20, 1985.

12 *Ibid.* at 16. The Bankers' Association also opposed the remedies of the lien against the land and the holdback. At page 5f. of its brief the Association states:

> [W]e recommend a serious examination of the possibility of replacing the holdback system with more suitable guarantees for contract compliance. Berman and Waitzen [sic] survey various possibilities which are less intrusive into the free workings of the marketplace. For example, bonding and insurance are more responsive to particular situations and less disruptive of cash flows. The construction industry already has significant familiarity with performance and labour and material bonds.
>
> If adequate bonding is in place, there would be not [sic] need for the rigid holdback structure or the statutory charge on land. Expecially for major projects, it would be more efficient to simply "opt out" of the legislation if a statutory test for adequate alternative protection is met.
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> For an account of the Commission's position in respect of the bonding alternative see *supra* Ch. I at 6f.

13 *Supra* Ch. I at 5f.

provinces of Canada, many of whom have recently completed studies of their Acts and have amended the same by inserting the additional trust provision protection. We agree that care has to be taken in examining the trust provisions of Ontario and in learning from their experience, but firmly believe that both holdback provisions and trust provisions are necessary in our provincial mechanics lien legislation.[14]

In a similar vein, *The Special Committee of the Law Society of Newfoundland With Respect to The Mechanics' Lien Act* stated:

> We also agree that the Commission should examine the Ontario experience with respect to the trust provisions of the *Ontario Act* prior to formulating precise recommendations or draft legislation. . . .we do not . . . agree with the position put forward by the Banker's Association. At page 10, the Banker's Association states: "Similarly, if funds in a bank account are impressed with a trust, the bank may lose its common law right to set off monies in the account against other debts owed by the customer to the bank." We agree that this is the result, but it is the contemplated and desired result where those funds are trust funds. The whole purpose of the trust provisions is to ensure that those who provided the labour and materials to construct the building get paid from the trust funds in priority to other creditors, including the Bank. We would also not necessarily agree with the position put forward by the Banker's Association that there should be an express exemption of lenders from liability as a constructive trustee unless the claimant shows that the Bank had actual knowledge of the trust arrangement.[15]

This Commission takes the position in agreement with the majority of parties who made representations to us that the remedies which the current legislation provides should be reinforced by inclusion of trust provisions. This is the recommendation we made in our *Working Paper*, and it received overwhelming support.

In its 1972 review of the trust provisions contained in its legislation the British Columbia Law Reform Commission observed:

> The Commission has discovered no evidence to suggest that the existence of a trust is increasing the difficulties of contractors and subcontractors in obtaining credit facilities from lending institutions. Moreover, the trust does conform to the general policy of the Act in trying to keep contract moneys within the framework of the parties to the contract, and it does not appear to cause any additional slowing down of the flow of funds along the construction chain.[16]

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14 *Newfoundland and Labrador Construction Association: Supplemental Report*, October 22, 1985, at 2.

15 *Second Supplemental Report*, December 4, 1985, at 5.

16 *The British Columbia Report* at 91-92. See also Perter E. Darby, *The Nova Scotia Report*, *supra* Ch. 1, fn. 1, at 21, 22.

In 1979, the Manitoba Law Reform Commission concluded:

> [A]lthough the question was raised, no evidence has been produced to the Commission showing that the trust provisions increase the difficulties of builders in obtaining credit from financial institutions. . . . we therefore recommend that the trust provisions . . . should be included in *The Mechanics' Liens Act* and furthermore that they be accompanied by adequate enforcement provisions to ensure their observance.[17]

The consensus in both these jurisdictions supports the inclusion within mechanics' lien legislation of statutory trust provisions.[18] We agree. However, we acknowledge the lack of familiarity with the operation of such provisions in this jurisdiction and are sympathetic to the request for detailed particulars as to their operation. We believe that an examination of such provisions in this *Report* would be of use and propose in the remainder of this Chapter to undertake such an analysis. Because the ministerial reference to us made explicit mention of the trust provisions contained in the Ontario *Construction Lien Act, 1983*, it is upon these that we will concentrate. Where appropriate we will, however, make reference to the new legislation in Saskatchewan which followed upon the heels of the Ontario Act. We wish to thank those individuals, especially those from the province of Ontario, who aided us in our task with their learned comments.[19]

2. THE ONTARIO TRUST PROVISIONS: *THE MECHANICS' LIEN ACT*

We have seen that Ontario has had trust provisions in its mechanics lien legislation since 1942. Application of these provisions over time, however, showed them to be less than satisfactory. They were fraught with much ambiguity[20] and served to generate no small amount of controversy and litigation. McGuinness commented upon them as follows:

> The trust provisions of the Mechanics' Lien Act were a statutory quagmire. It is doubtful whether anyone ever understood them; certainly no one was ever able to explain them. There were many cases decided with respect to the trust provisions; but few, if any of those cases, were ever decided by the application of the legislation to the facts. Instead, in handing down their decisions, the courts sometimes mentioned that there were trust obligations imposed under the Act, and then proceeded to define these obligations on an apparently ad hoc basis. While this judicial evolution of the law was generally based upon the traditional rules of equity, there were some noteable [sic] departures from these rules. The

17 *The Manitoba Report*, *supra* Ch. 1, fn. 1, at 21, 22.

18 The Manitoba legislation of 1980-91 provided for the inclusion of revised trust provisions. See S.M. 1980-81, c. 7/B.91, ss. 4-9.

19 In particular, Stephen J. Fram, Ministry of the Attorney General Ontario, Policy Development Division; and Harvey J. Kirsh, Cassels, Brock and Blackwell, author of the text, *Kirsh: A Guide to Construction Liens in Ontario*, 1984, and Kirsh (ed.) *The Construction Lien Act: Issues and Perspectives*, 1989.

20 See Darby, *The Nova Scotia Report* at 130-162.

> result of this poor legislative drafting and judicial creativity was a confused state of the law, which seemed to work to the detriment of everyone other than lawyers.[21]

Among the difficulties that existed under these provisions were the lack of clarity as to the magnitude or extent of the duties and obligations imposed and the uncertainty as to the manner in which these duties and obligations might be discharged. Both these issues had been identified in other provinces in earlier law reform commission reports on their respective Mechanics' Lien Acts.[22] The Ontario Advisory Committee in considering new draft legislation for that province addressed these issues yet again.

After extensive review, the Ontario Committee determined that the case law as it had developed under its Act, and in particular in *Bre-Aar Excavating Ltd.* v. *D'Angela Construction (Ont) Ltd.*,[23] should be reversed. In *Bre-Aar* the Court had held that an owner or other payer who has reason to believe that payment to a person he is liable to pay will likely result in a breach of trust by that person to some other beneficiary must withhold payment. The Committee reasoned that such a rule

> put all payers in a very difficult position. Each time a payer made a payment on a contract or subcontract, he . . . had to decide whether he had reasonable grounds to believe that a breach of trust might result. If he was aware of such grounds, he . . . [was] required to refrain from payment. The Committee believes that there are many cautious payers

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21 McGuinness, *Construction Lien Remedies in Ontario*, 1983, at 280.
22 *The British Columbia Report* at 100; *The Nova Scotia Report* at 150-151
23 (1975), 8 O.R. (2nd.) 598 (H.C.)

in the construction industry, and wonders whether these payers would ever be willing to make a payment, knowing that they might risk further liability if they did so.[24]

In the interest of expediting the orderly and regular flow of contract money throughout the pyramid the Committee resolved to limit the trust obligations of the various payers to those persons standing in privity of contract with them.[25] They resolved also to clarify the manner in which trust obligations, once they had arisen, might be discharged.[26] In this regard, such issues as set-off and recoupment from trust funds were in need of precise restatement.[27]

3. The Ontario Trust Provisions: *The Construction Lien Act, 1983*

Part II of the *Construction Lien Act, 1983* creates an interrelated series of trusts whose effects are felt from the apex to the base of the construction pyramid. The various provisions attempt to balance the interests of protection to suppliers with the need to facilitate to the extent possible the flow of funds down the pyramid.[28] The duties and obligations imposed upon the statutory trustee at each level are set forth in some detail.[29] Where a person in possession of trust funds is in doubt as to the extent and nature of his obligation, provision is made for an application to the Court for direction.[30]

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24 *The Ontario Committee Report* at xxxiii.

25 *The British Columbia Report* at 100 noted as regards subsection 3(1) (now 2(1)) of its Act:

> The significance of [the problem of the relationship between the doctrine of privity of contract and the existence of a trust] lies chiefly in the decision of Dryer J. in *Crane Canada Ltd.* v. *McBeath Plumbing and Heating Ltd.* [(1965), 54 W.W.R. 119 (B.C.S.C.)] In that case, his lordship, following the judgement of the Court of Appeal of Manitoba in *Royal Bank* v. *Wilson*, [(1963), 42 W.W.R. 1] held that the trust created by section 3 (1) applies for the benefit of beneficiaries who contract directly with the person alleged to be trustee, but not for the benefit of persons who claim under the person who contracted directly with the person alleged to be trustee. Thus, if the contractor hold contract moneys on trust, the beneficiaries are the subcontractors and suppliers he employed, but not the sub-subcontractors and the supplier employed by the subcontractor. Correspondingly, once the trust moneys come into the hands of the subcontractor, a trust attaches in favour of the sub-subcontractors and suppliers employed by the subcontractor. The situation might aptly be summarized as one of "privity of trust."
>
> The Commission feels that the principle of privity of trust, in the context of the *Mechanics' Lien Act*, is a sound one. Dryer J. based his decision on a construction of the wording of the trust section of the Act. Whilst this construction of section 3 of the Act can be supported, the section is so badly drafted that a quite difference construction could also be supported. The section should be revised in such a way as to indicate clearly that contractors and subcontractors are trustees only of people they themselves employ, . . .

26 *The Construction Lien Act, 1983*, S.O. 1983, c.6, ss. 10, 11, and 12.

27 See *infra* p. 99f.

28 *The Ontario Committee Report* at xxxiiif.

29 The obligations imposed upon the statutory trustee under the Act are somewhat at variance from those imposed at equity. See McGuinness *supra* n18 at 50-51.

30 See Section 68 of the *Construction Lien Act, 1983* which states:

> Where a person has in his possession an amount that may be subject to a trust under Part II, he may apply to the court for direction and the court may give any direction or make any order that

Section 7 of the Ontario Act, the opening section of Part II, states:

> 7.(1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by him at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> (3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by him at any time thereafter constitutes a trust fund for the benefit of the contractor.

Subsection 1 of Section 7 creates what has been called the *mortgage trust*.[31] It is similar in import to subsection (1) of section (6) of the Saskatchewan *Builders Lien Act*. The provision impresses with a statutory trust all money received by an owner (in essence, borrowed money) for the purpose of financing the improvement. The Crown and municipalities are exempted ". . . because the manner of allocating public funds towards expenditures upon improvements is inconsistent with the nature of the trust obligations imposed."[32] The trust includes money received that is to be used to purchase and to clear the title of the land on which the improvement is to be constructed; in such cases, however, the trust is subject to payment of the purchase price and prior encumbrances. Because the trust arises when the money is "received," the provision would not appear to extend to accounts

31 See Kirsh, *Kirsh: A Guide to Construction Liens in Ontario*, 1984 at 796.
32 McGuinness, *supra* fn. 21 at 260.

receivable. However, Kirsh points out that when money has been "received" is a question of fact and has been the subject of litigation.[33]

Subsection 2 of section 7 imposes a second trust obligation on the owner. It provides for the creation of the *certificate trust*. We have seen above that it is not unusual for the contract, particularly in the case of a large project, to call for payments to be made by the owner to the contractor on the certificate of a payment certifier, usually an architect or engineer.[34] Where such a certificate has been issued the effect of the provision is to impress with a trust an amount equal to the amount so certified that is in the owner's hands, or that is received by him at any time thereafter. The intent of the provision is to catch situations where an owner is using his own funds to finance the improvement.[35] Subsection (2) of section 6 of the Saskatchewan Act is somewhat similar.[36]

Subsection 3 of section 7 imposes a further trust obligation on the owner. It provides that where a certificate of substantial performance has been issued or a declaration of substantial performance has been made by the Court an amount in the owner's hands that is equal to the unpaid price of the substantially performed portion of the contract is impressed with a trust for the benefit of the contractor. The *Ontario Committee Report* explains that because a certificate or declaration of substantial performance might be obtained even in the absence of progress draws on the certificate of a payment certifier it is conceivable that at the point of substantial performance something less may have been paid than what has been certified or declared as due and owing.[37] The purpose of subsection 3 of section 7 is to impress

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33 Kirsh, *supra* fn. 31 at 80; see also McGuinness, *supra* fn. 21 at 263.

34 *Supra* ch. III at 66.

35 See McGuinness *supra* n. 21 at 48 where the author says:

> The section 7(2) trust obligation depends upon the existence of a payment certification system. In the absence of such a system, a self-financing owner will not be subject to a trust obligation under this subsection . . . . The requirement for payment certification results from the need to identify a specific amount of money which is subject to the trust. Since the amount owed to the contract usually fluctuates as the project progresses, in the absence of a payment certification system it is not usually possible to determine the precise amount which is owed to the contractor. Fortunately, the payment certification system is the norm in the case of large improvements.
> Section 7(2) is very similar to section 3(3) of Ontario's predecessor *Mechanics' Lien Act*. David Bristow points out that there are few reported decisions on the effect of this section. See Bristow, *supra* fn. 3 at 377f.

36 The Saskatchewan provision would, however, expressly include the Crown. Subsection 6(2) states:

> Where the owner provides his own capital or where the owner is the Crown, and where amounts become payable under a contract to a contractor, the moneys in the hands of the owner or received by him for payment under the contract at any time thereafter constitute a trust fund for the benefit of the contractor.

37 *The Ontario Committee Report* at 35.

this amount with a trust. The new Saskatchewan legislation contains no such provision.

Section 7 outlines the various trusts imposed upon the owner at the apex of the construction pyramid. The immediately following section follows the contract money down the pyramid imposing trust obligations on the contractor and subcontractor at each successive tier. Subsection 1 of section 8 reads:

> 8.(1) All amounts,
> (a)owing to a contractor or subcontractor, whether or not due or payable; or
> (b)received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

The intent in impressing with a trust any money received by, or owing (whether or not due or payable)[38] to, a contractor or subcontractor is to protect those working on the improvement from the insolvency or bankruptcy of the contractor or any of the various subcontractors. The trusts created by the provision take priority over any garnishment or assignment of debts to which these moneys relate, and also it appears demands under the *Excise Act*, R.S.C. 1985 E.15 and the *Income Tax Act*, S.C. 1970-71-72, C.63.[39] The *Ontario Committee Report* explains the purpose of the provision as follows:

> It is designed primarily to protect those working on an improvement from the insolvency or bankruptcy of a contractor or subcontractor. Where money is paid under a contract or subcontract after the contractor or subcontractor has gone bankrupt, the money received by the trustee administering the bankrupt's estate is impressed with a trust. The trust fund must first be used to satisfy the claims of the beneficiaries. The trustee in bankruptcy becomes entitled to money paid to the bankrupt contractor or subcontractor for the benefit of general creditors of the bankrupt only if there is a surplus.

Subsections 7(1) and 8(1) of the new Saskatchewan legislation are equivalent provisions.

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38 Kirsh explains the inclusion of the phrase "whether or not due or payable" as follows:
The rationale for including the caveat in s. 8(1)(a) that the monies, although owing, need not be due or payable obviously is directed at prohibiting the payer from converting or making unauthorized use of trust funds during the period of credit which the trades customarily provide.

39 The provision is intended to codify the rule laid down in *Minneapolis-Honeywell*, *supra* fn. 2 at 697 where Rand J. states:
The assignee of such moneys must either see to the satisfaction of the rights under the trust, either directly or by way of subrogation to them, or run the peril of participating in a breach of it. I have no doubt that no assignment can destroy the rights [of the trust beneficiary].
See also *Modular Products Ltd.* v. *Aristocratic Plywoods Ltd. et. al.*, [1974] 2 W.W.R. 90 (B.C.C.A.). In this respect the subsection 8(1) may be regarded as declaratory.

The final trust established by Part II of the *Construction Lien Act, 1983* is the so called *vendors trust*. Subsection 1 of section 9 of the Act provides:

> 9.(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
> (a)the value of the consideration received by the owner as a result of the sale,
> less
> (b)the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
> constitutes a trust fund for the benefit of the contractor.

The *Ontario Committee Report* explains that this provision is intended to be of particular use in the case of residential subdivision construction where a developer-owner constructs premises for the purpose of immediate sale.[40] In such situations, unless the purchaser is an *owner* within the meaning of the Act,[41] unregistered lienholders will lose their rights against the property upon sale. The purpose of subsection 9(1) is to prevent circumvention of lien claims by constituting the net consideration received by the (former) owner as a result of the sale a trust fund for the benefit of the contractor who made the improvements. The *Committee Report* says:

> As a general rule, it would be unfair to attach liability to an innocent purchaser of a new home.
>
> The section corrects the problem by providing that the consideration received by the vendor from the sale constitutes a trust property. All liens that would have been enforceable against the property, prior to the sale, continue as a charge against this trust property.[42]

Unregistered lienholders who helped create the value of the improvement are thus protected in sale situations.

The magnitude or extent of the trust obligations imposed upon the owner, contractor, and subcontractor by sections 7, 8 and 9 and the manner in which these obligations may be discharged are defined with some exactitude in the Act. The applicable provisions state:

> S.7 (4) The owner is the trustee of the trust fund created by subsection (1), (2) and (3), and he shall not appropriate or convert any part of a fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.
>
> S.8 (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust

40 *Ontario Committee Report* at 40.
41 See *supra* Ch. II at 18f.
42 *Ontario Committee Report* at 39-40.

until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by him.

S.9 (2) The former owner is the trustee of the trust created by subsection (1), and he shall not appropriate or convert any part of the trust property to his own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to him related to the improvement.

The essence of the obligation imposed upon the various statutory trustees under these provisions is to pay those individuals to whom they are immediately liable for the provision of services and materials. The trustees are prohibited from appropriating to their own use any money impressed with a trust until their respective beneficiaries have been paid. Thus the owner is to pay the contractor; the contractor the subcontractors; the subcontractors the sub-subcontractors; and so on. Unlike under the old Act, each trustee has no obligation to any person other than a supplier who has privity of contract with him[43] (except to comply with the holdback provisions). Where the trustee makes the requisite payment, his trust obligations are discharged in full. Section 10 of the Act makes this clear:

Subject to Part IV (holdbacks), every payment by a trustee to a person he is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and his obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by him.

The *Committee Report* explains that the intent of this provision is to define precisely the manner in which the trustee's obligation may be satisfied. Payment discharges the trust on a dollar for dollar basis.[44]

In determining the extent of the trustee's liability, allowance is made for set-off against and recoupment from trust funds in certain specified circumstances. In this regard, sections 11 and 12 of the Act provide as follows:

11. (1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by him without being in breach of the trust.

(2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to him, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust.

12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between himself and the

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43 See *supra* section 2 of this Chapter at 86f.
44 *Ontario Committee Report* at 40.

person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to the improvement.

Subject to section 30 which prohibits set-off against the holdback,[45] a trustee is permitted to retain from trust funds otherwise payable the balance in his own favour of all outstanding debts, claims or damages that exist as between himself and the trust beneficiary. This right of set-off is extremely wide. It obtains whether or not the outstanding debts, claims or damages are related to the improvement. In addition pursuant to section 11 where a trustee uses non-trust money to pay a trust beneficiary he may retain from the trust fund an equivalent amount without being in breach of trust. Further, he is permitted to repay out of trust money funds borrowed to discharge his trust obligation to the extent that the lender's money was so used. McGuinness explains that this last provision is of importance as it "ensures that the trust provisions of the Act will not prevent a payer from repaying amounts borrowed by him against his own operating line of credit."[46]

Where corporations are involved in a breach of trust, Section 13 of the Act imposes special rules of liability. The provision reads as follows:

(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
(a)every director of a corporation; and
(b)any person including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities, who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable.

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair

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45 Section 30 of the *Construction Lien Act, 1983* corresponds to subsection 13(9) of the Newfoundland *Mechanics' Lien Act*.
46 McGuinness, *supra* fn. 21 at 265-266.

and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances.

The express purpose of these provisions is to prevent the use of a shell corporation as a means of defrauding creditors.[47] Where a corporation has breached its trust obligations, Section 13 allows the Court to pierce the corporate veil and attribute liability to every director, officer, employee, agent or other person having effective control of a corporation (for example, a majority shareholder) who might be responsible for the breach of trust. The test to be satisfied is whether these persons assented to or acquiesced in conduct which they knew, or reasonably ought to have known, amounted to a breach of trust. The *Committee Report* explains that the words "assents to or acquiesces in" contained in subsection (1) are meant to indicate that only those who had the power to prevent the breach should be held liable.[48] However, the knowledge requirement "knew, or reasonably ought to have known" makes it clear that liability will not be easily avoided and that great diligence on the part of those responsible is required when dealing with money impressed with a trust.[49]

Pursuant to subsection (3) of Section 13, all persons found liable or who have admitted liability under Part II of the Act are jointly and severally liable. However, subsection (4) allows for contribution as between the parties. It provides for equal contribution by all the liable trustees, unless the court considers such apportionment to be unfair. In that event such apportionment as is adjudged fair in the circumstances may be ordered.

Section 13 is the concluding section of Part II of the *Construction Lien Act, 1983*. It will be noted that no special limitation period within which breach of trust actions must be commenced is provided. This is in contrast with section 4 of the *Mechanics' Lien Act* which contained a nine month

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47 *The Ontario Committee Report* at 44.

48 *Ibid.* This provision was the cause of some comment by the Newfoundland Branch of the Canadian Bankers' Association. In a letter dated January 26, 1987, to the Commission, Harvey J. Kirsh said of the Bankers' concern:

> I note that the brief submitted by the Newfoundland Branch of the Canadian Bankers' Association expressed concern that a receiver or receiver-manager, and possibly the debenture-holder, may have exposure to liability. However, it is my view that if a receiver or a receiver-manager deals with trust funds belonging to a corporate debtor in a manner not authorized by the trust, he ought to be held fully accountable. Where a receiver or receiver-manager comes into possession of money that he believes may be impressed with a trust, he may apply to the court for directions as to the rights and obligations of all parties interested in the trust, pursuant to section 68 of the Act. As for the debenture holder, it will be a question of fact as to whether or not he "assented to or acquiesced in "conduct which he knew or reasonably ought to have known amounted to a breach of trust."
> In this context mention ought also be made of Section 33 of *The Trustee Act*, R.S.N. 1970, c. 380.

49 See McGuinness, *supra* fn. 21 at 276.

period in favour of lenders. The *Committee Report* rejected the necessity of such a provision. It said:

> In the opinion of the Committee, no claim arising from a breach of trust should be barred by a special limitation period. The ordinary limitation periods, as well as the equitable doctrine of laches, should apply to such claims. In these circumstances, there should be no special exemption for banks and other financial institutions.[50]

In reaching this conclusion, the Committee was clearly of the view that as regards trust actions all potential defendants should be treated equally. Moreover, as a class they should all be subject to the general rules governing the commencement of actions for breach of trust.[51]

Where a trustee becomes insolvent, priorities amongst trust fund claimants are governed by Section 87 of the Act which provides:

> 87. (1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien.
>
> (2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part.
>
> (3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved.

The priority scheme established under this provision is at variance from the normal rules of equity. Under these rules impartiality is the guiding principle.[52] The trustee is required to distribute the trust money on a rateable basis amongst all beneficiaries. However, departure from that rule in recognition of the realities of the construction process has been accepted by the Courts.[53] In support of this proposition, the *Committee Report* cites *Guarantee Trust Co. of Canada v. Beaumont*.[54] As a result of this and other cases, the requirement of rateable distribution has been restricted to situations where the trustee becomes bankrupt or insolvent. Section 87 would do

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50 *The Ontario Report* at 77.

51 For a review of the general limitation rules governing breach of trust actions in Ontario, see The Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at 53-61.

52 See D. W. M. Waters, *The Law of Trusts in Canada*, (2d. ed., 1984) "Duty to Act Impartially Between Beneficiaries," at 787f.

53 In this regard, see McGuinness, *supra* fn. 19 at 268.

54 [1967] 1 O.R. 497, 61 D.L.R. (2nd) 286 (C.A.); see, *The Ontario Committee Report* at 202.

away with even this rule. *The Committee Report* explains its reasoning as follows:

> Under section 87 priority in the distribution of trust funds is given to those beneficiaries whose liens have not expired. The preservation and perfection of lien claims requires deligence[sic]. It is only fair for those who have taken care to protect their interests to be given priority over those who have not taken such steps.[55]

As amongst those who have preserved and perfected their liens, priority in distribution of trust funds is in accordance with the priority of their liens as established under earlier sections of the Act.[56] The balance of the trust funds, should there be any, is to be distributed amongst the remaining beneficiaries who do not have liens in accordance with the priorities that would have applied had their liens been proved. The *Committee Report* comments:

> Subsection 3 is a departure from the present law. It continues the general scheme of priority in the distribution of trust funds, even among trust beneficiaries whose liens have expired. In the opinion of the Committee, the same considerations which militate in favour of granting priority to a particular type of lien claimant are no less cogent where a person of that type makes a claim as a trust beneficiary.[57]

4. Position of the Newfoundland Law Reform Commission

In Chapter 1 of this *Report* the Commission proposed that the present *Mechanics' Lien Act* be entirely rewritten. We indicated that the demands of clarity, consistency, and accessibility could be best met by a new lien statute, contemporary in language and principle, and more in line with the modern realities of the construction industry.[58] In section 1 of this Chapter, we recommended that among the new concepts to be written into a revitalized lien statute should be that of the trust. This is in recognition of the majority view put before us prior to publication of our *Working Paper* and in response to it that the remedies of the lien against the land and the holdback contained in this Province's current legislation should be reinforced by the inclusion of trust provisions.

Part II of the *Construction Lien Act, 1983*, with some modification, provides an appropriate model for the drafting of such provisions. We add the qualifying phrase because, while in agreement with the overall thrust of the Ontario provisions, we do have some concerns on a number of issues. We believe further that the Brief from the Newfoundland Branch of the Canadian Bankers Association deserves some additional comment. We will address these issues under separate headings in the remainder of this section.

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55 *Ibid.*
56 See sections 81, 82, 83, and 84 of *The Construction Lien Act, 1983*.
57 *The Ontario Committee Report* at 202.
58 *Supra* Ch. 1 at 7f.

(a) Banks

The Newfoundland Branch of The Canadian Bankers' Association expresses its principal concerns in respect of the inclusion of trust provisions in lien legislation in this Province as follows:

> One possible implication of trust provisions, such as those which exist in Ontario, is that banks will unwittingly become implicated in a breach of trust by an owner or contractor. Similarly, if funds in a bank account are impressed with a trust, the bank may lose its common-law right to set-off monies in the account against other debts owed by the customer to the bank. It is clear that if the bank has actual knowledge that funds are trust funds it may attract liability if it deals with the funds in a manner inconsistent with the trust. It is equally clear that a bank's flexibility with respect to set-off is unimpaired if is possesses absolutely no knowledge of the existence of a trust. The difficulty is the potential breadth of the middle-ground which might be characterized as "constructive notice." Would a bank have to closely scrutinize every disposition of funds which involve improvements to land, even to the point of searching registries for mechanic's lien claims? To avoid such extremes, it would be preferable if any trust provisions to be considered contained an express exemption of lenders from liability as a constructive trustee (or for waiver of the right of set-off) unless the claimant shows that the bank had *actual* knowledge of the trust arrangement.[59]

Representations similar to those made on behalf of the Newfoundland Branch of the Canadian Bankers' Association were considered by the Saskatchewan Committee in its review of the trust provisions to be included in its new legislation. The *Saskatchewan Report* states:

> The Committee received representation to the effect that a lender should not be liable for breach of trust when it applies money in a trustee's account to a pre-existing indebtedness unless the lender has actual notice of a lien claim and that the money is impressed with the trust. This is the same representation that was made to the Manitoba Law Reform Commission and like the Manitoba Commission, the Committee does not feel it is possible to accede to the request. If, as the Committee believes, the law has now been accurately and adequately stated by the Supreme Court of Canada, then a lender is liable when he has sufficient facts to be "put on inquiry".[60]

The references to the Supreme Court of Canada is to the decision of that Court in *Carl B. Potter Limited v. Mercantile Bank of Canada*.[61] In *Potter* the Court was called upon to consider the use to which a bank could put funds contained in a customer's account. The appellant was one of several companies who had bid for the construction of a waste treatment plant. Its tender, as were the tenders of other bidders, was accompanied by a certified cheque. The terms of the Bid and Performance Guarantee clearly stated that

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59 *Brief of the Newfoundland Branch of the Canadian Bankers' (June, 1985) at 9-10.*
60 *The Saskatchewan Report* at 35.
61 [1980] 2 S.C.R. 343.

the cheque of the successful bidder could be cashed, provided the proceeds were deposited in a separate interest bearing trust account in the owner's name. At a meeting between the vice-president in charge of finance for the owner and the vice-president of the Bank on April 21, 1975, the Potter cheque and that of another bidder was exchanged for an 18 day deposit certificate in the owner's name. The 18 day period was to be used to determine which of the two companies was the more appropriate to carry out the contract. The other bidder on learning that its deposit was no longer being held in its original form demanded the return of its money. The bank, thereupon, drew a cheque in its favour. The Potter cheque, however, remained. When the 18 day period had run, these funds were deposited to the owner's collateral account at the bank and used "...to bolster up the increasingly shaky credit position of . . . [the owner] . . . with the bank and with its many other creditors."[62] Subsequently the owner went bankrupt and Potter could not recover its funds. In the circumstances Ritchie J. speaking for a unanimous Court held that the Bank must have known the funds were impressed with a trust. At page 348 of his judgment he says:

> I am satisfied that on April 21, 1975, and from that day forward, the bank was in possession of sufficient information which required its vice-president and assistant manager to take steps to ascertain the character of the funds which were being deposited to Anil's [the owner's] credit although those funds were not in fact the property of the bank's customer but rather constituted the proceeds of two cheques which were stamped with the trust imposed by the terms of the performance guarantee to which they had been subject since they were initially created. Notwithstanding the fact that the exact terms of the performance guarantee may not have been known to the bankers, they must be taken to have known that their customer was contemplating the construction of a waste treatment plant and the presentation of the two cheques from construction companies was enough in my view to alert them to the nature of the transaction.[63]

More importantly, the following general proposition was articulated in respect of Banks which have been put *on the alert*.

> The position of a banker who has been placed *on inquiry* in the manner aforesaid is summarized in the following brief paragraph from *Halsbury's Laws of England* (4th ed.) vol III, para. 60:

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62 *Ibid* at 346.
63 *Ibid* at 348.

> A banker may be a constructive trustee of money in his customer's account and in breach of that trust if he pays the money away, even on the customer's mandate, in circumstances which put him upon inquiry.[64]

This case has been followed in *Halifax Insurance Co.* v. *Canadian Imperial Bank of Commerce*[65] and in *Perlmutter Shore Ltd.* v. *Bank of Montreal*,[66] a mechanics' lien case out of the Supreme Court of Ontario. In that case Eberle J. said:

> If I am wrong in concluding that the bank knew that Concept was on the verge of bankruptcy, I am satisfied that the bank had knowledge of a sufficient range of facts and circumstances *to oblige it to make some inquiry* [emphasis added] before appropriating to itself the only funds in Concept's account. Any simple inquiry by the bank would have brought home to it the disaster awaiting the beneficiaries of the trust fund. *Instead of making inquiry, the bank employees simply pulled the bank's security blanket down over their eyes*[emphasis added].

This Commission is in agreement with the position stated in these cases and adopted in the Manitoba and Saskatchewan Reports that where a bank is in possession of sufficient information to be put on inquiry it should be held liable as a constructive trustee if it misapplies trust funds to a pre-existing indebtedness. We are of the view that an express exemption in favour of lenders from liability in constructive trustee situations would be contrary to the protective ends which mechanics' lien legislation seeks to achieve. We note that the non-existence of this kind of exemption in other provinces with trust provision does not appear to have had ill affects on the availability of credit.

(b) Set-Off

We have seen that pursuant to section 12 of the *Construction Lien Act, 1983* an owner, contractor or subcontractor may, subject to his holdback obligations, retain from the trust funds he is otherwise obliged to pay the balance in his own favour of all outstanding debts, claims or damages that exist as between himself and the trust beneficiary.[67] This is so whether or not the outstanding debts, claims or damages are related to the improvement. In his *Guide to Construction Liens in Ontario*, Kirsh notes of this provision:

> The fact that the contractor's set-off claim does not necessarily have to be related to the improvement may give rise to situations where the essential facts and issues relating to the improvement will be unduly

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64 *Ibid* at 347.

65 52 Nfld. and P.E.I.R. 107 (S.C.T.D. Nfld.; per Lang, J.); see also *London and Westminister Bank* v. *Trustees of the Commercial Bank*, [1897] Nfld. L.R. 8 (per Carter, C.J.N.).

66 (1981), 34 O.R. (2d) 577 at 583 (H.C.). This case examines the authority at both ends of the spectrum as outlined in the Bankers' Brief. It concludes that *Potter* supercedes the previous conflicting authority.

67 *Supra* at 93f.

complicated by extraneous issues requiring, in effect, separate trials for set-off claims.[68]

From a more theoretical perspective, the *Saskatchewan Report* opined ". . . that to allow set-off with respect to debts, claims or damages not incurred on the construction project . . . [is] contrary to the principle of ensuring that money with respect to a particular project should be kept in the construction pyramid."[69] This Commission believes that there is merit in both of these objections. We take the position, as with the Saskatchewan Committee, that a right of set-off ought to be allowed but that such claims must be related to the improvement. We believe this restriction to be consistent with the protective ends of the legislation. In addition, it will avoid the practical difficulties to which Kirsh adverts.

(c) Limitation of Actions

We have noted above that the *Construction Lien Act, 1983*, contrary to its predecessor legislation, *The Mechanics' Lien Act*, contains no special limitation period within which breach of trust actions are to be commenced.[70] This is contrary also to the recommendation contained in the *Discussion Draft*. Section 14 of the proposed draft legislation contained in that document is as follows:

> 14. No proceeding to assert a claim to any trust fund shall be brought later than one year after the payment upon which the claim is made became due.[71]

The explanatory comment accompanying the proposed provision stated:

> This section replaces section 3 of *The Mechanics' Lien Act*. Section 3 sets up a limitation period which only applies in respect to actions against banks and other lending institutions. It would not apply in actions against the statutory trustees themselves. While it is clear that an open-ended tracing period would be harmful to lending institutions, there is no reason why the special limitation period set up by the Act should apply only to them. Open-ended tracing is equally harsh to the construction industry. It seems preferable for the same limitation period to apply to all trust actions under this Part of the Draft Act.
>
> The special limitation period is justified by the practical peculiarities of the trusts arising under this Act. Unlike many types of trusts, where a trust under this Act is breached, it will usually be quickly discovered. The purpose of the trust is to ensure that those who have supplied services or materials to an improvement are paid for their efforts. The trust is discharged by making payment. If a beneficiary does not get paid, he will be aware within a short period of time of the breach of trust. A

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68 *Kirsh, supra* fn. 31 at 85.
69 *The Saskatchewan Report* at 20.
70 *Supra* at 95.
71 *Ontario Discussion Draft* at 44.

limitation period of a year would appear to cause no hardship even in the case of trust provisions for workers.

Under this provision, the limitation period runs from the date when payment is due. The one-year limitation period should encourage the expeditious resolution of trust disputes.[72]

The *Committee Report* rejected the *Discussion Draft* proposal for the reasons indicated above.[73] The *Construction Lien Act, 1983* left actions for breach of trust to be governed by the equitable doctrine of laches and the general limitation periods otherwise applicable.

In our *Working Paper on Limitation of Actions*,[74] this Commission carried out a comprehensive review of the limitation provisions governing actions for breach of trust in this jurisdiction. We indicated that the principal statutory enactments in this Province relating to actions against a trustee are to be found in *The Trustee Act*, R.S.N. 1970, c. 380. Subsection (1) of Section 31 of that Act states:

> 31.(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously retained by the trustee and converted to his use, the following provisions shall apply
> (a)all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner, and to the like extent, as they would have been enjoyed in such action or other proceeding if the trustee, or person claiming through him, had not been a trustee or person claiming through him;
> (b)if the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled to possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

Except in the listed instances of serious breaches of trust, this provision provides that in actions against trustees, statutes of limitation shall apply as if there were no trust; if no statute of limitation is applicable and the action is to recover money or other property, the action is to be treated as if it were an action of debt for money had and received. Pursuant to section 2 of *The*

72 *Ibid.*
73 *Supra* at 95.
74 The Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions*, NLRC-WP1, January 1985; See in particular Ch. V, "Actions Against Trustees," at 92f.

Limitation of Actions (Personal) and Guarantees Act, R.S.N. 1970, c. 206, such actions are subject to a six year period. Subsection 31(1)(b) of *The Trustee Act* gives a trustee the right to plead the equitable defence of lapse of time. Where the claim alleged involves fraud or fraudulent breach of trust, or the retention or conversion of trust property or the proceeds thereof the trustee receives no limitation protection.[75]

In our *Working Paper on Limitation of Actions*, this Commission took the position that, to the extent possible, all actions should be governed by some period and that in the interest of *certainty* and easy ascertainability there should be as few special limitation periods as possible.[76] We indicated that among those circumstances where a special period might be justified was where the period in question constituted an integral part of a larger legislative scheme relating to the operation of the substantive provisions of that scheme. As an example of such a period, we referred to section 23 of *The Mechanics' Lien Act* which sets forth the time periods governing the preservation of lien claims.

After much discussion the Commission agreed in accordance with the principles articulated in our earlier study, and in the interest of maintaining the Province's lien legislation as an independent unitary whole, that inclusion within the proposed trust provisions of a special period governing trust actions would not be inappropriate. In recognition of the concerns recently expressed in virtually all sectors of the construction industry as to the *discoverability rule*[77] and in the interest of *certainty* we took the position that this period should not run from the point at which the beneficiary knows, or reasonably ought to know, of the breach. We believe that certainty would be better served by having the period commence on the completion or abandonment of the contract. We believe further that this period should apply on a non-discriminatory basis to all players within the construction industry. Banks and lending institutions should not be accorded a special status.

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75 *Ibid.* at 105. In this regard, see also Waters, *Law of Trusts in Canada* (2nd ed. 1984) at 1014f. The author states at p. 1017 as follows:

> [T]he trustee in Ontario [and in most other jurisdictions in Canada including Newfoundland] who has caused loss through a breach of trust which was nevertheless honest, such as a mistaken improper investment or a neglect to call in or collect trust funds, has a six-year limitation protection. But the trustee who retains trust property improperly at the time of the action, the trustee who has employed the trust property for his own benefit, and the trustee who is personally guilty of fraud, have no limitation protection. Each continues to be liable without limit of time in accordance with the original equity conception of the trustee's liability.

76 *Working Paper on Limitation of Actions*, 1985, NLRC-WP1 at 247f.

77 See Singleton "Reversing the Trend Towards Expanded Liability," and Rosenberg, "Limitation Periods as they Apply to Construction Litigation: The Law and Suggested Reform," Papers delivered at the Annual Meeting of the Canadian Bar Association, Construction Law Section, August 1987.

As to how long this period should be, we agree with the Ontario *Discussion Draft* and the *Saskatchewan Report* that a time frame of one year is appropriate.[78] On the expiration of this period, the right of action should be not only barred but also extinguished. This is in accordance with the general principles set forth in our *Working Paper on Limitation of Actions.*[79]

(d) Criminal Sanctions

Part II of Ontario's *Construction Lien Act, 1983* contains no penal provision. This is in contradistinction to that province's old *Mechanic's Lien Act* which had contained such a provisions since 1952.[80] Subsection 3(7) of Ontario's *Mechanics' Lien Act* read:

> S.3 (7) Every person upon whom a trust is imposed by this section who knowingly appropriates or converts any part of any trust moneys referred to in subsection (1), (3) or (4) to his own use or to any use not authorized by the trust is guilty of an offence and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both, and every director or officer of a corporation who knowingly assents to or acquiesces in any such offence by the corporation is guilty of such offence, in addition to the corporation, and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both.

Section 13 of the *Construction Lien Act, 1983* dealing with civil liability for breach of trust is intended to replace this provision.[81] It was reasoned that the penal sanction was unnecessary in light of section 336 of the *Criminal Code*, R.S.C. 1970, c-34, which provides for criminal prosecution in cases involving the conversion of trust funds with an intent to defraud. In cases where there was no such intent it was thought that an action to prove civil liability would be sufficient to rectify the breach.

Section 336 of the *Criminal Code* provides:

> 336. Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in violation of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 2 defines "trustee" as follows:

> "trustee" means a person who is declared by any Act to be a trustee or is, by the law of the province, a trustee, and without restricting the

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78 *Supra* at 100 and the *Saskatchewan Report* at 48.
79 *Working Paper on Limitation of Actions*, 1985, NLRC-WP1 at 323.
80 *An Act to Amend The Mechanics' Lien Act*, S.O. 1952, c. 54.
81 *Ontario Committee Report* at 45.

generality of the foregoing, includes a trustee on an express trust created by deed, will or instrument in writing, or by parol;

Though the *Ontario Committee Report* indicates that subsection 3(7) has been seldom used in that province,[82] reference to Macklem and Bristow shows that similar provisions have been employed in other jurisdictions to ground successful prosecutions.[83] In appropriate instances, section 336 of the *Criminal Code* has also been used. The principal distinguishing factor between the offences created by the two provisions is that, unlike the *Criminal Code* which requires proof of an intent to defraud, the *Mechanics Lien Act* does not require that this mental element be made out.[84]

The argument against inclusion of a provision like subsection 3(7) is that it represents an attempt to collect a civil debt by criminal prosecution and as such constitutes an abuse of the process of criminal law. Where this argument has been made, it has been rejected by the Court.[85] *The Saskatchewan Committee Report* regarded inclusion of such a provision as "a further legislative statement that trust funds are not to be diverted for purposes inconsistent with the trust."[86] In this regard the Committee adopted the reasoning of LeBel J. in *Bank of Montreal* v. *Sidney* where it was said in respect of the remedy for breach of trust that the "abuse it seeks to rectify "is made even clearer by the recent addition of the penal subsection."[87] It concluded that "there may be cases where the Crown feels a prosecution is warranted but cannot prove an intent to defraud. In these cases, the Crown should be provided with the legislative ammunition to proceed."[88]

The constitutional validity of penal provisions within mechanics' lien legislation has been litigated and held to be *intra vires* the legislative competence of a province.[89] *R. v. Brunner*[90] and *R. v. Serdom Construction Ltd.*[91] may be cited in this regard. Such provisions do not constitute the invasion of the field of criminal law reserved to the federal government under section 91(27) of *The Constitution Act 1867*.

The *Saskatchewan Committee Report*, after reviewing the new legislation in Ontario and the various arguments for and against, recommended inclusion of a penal provision within its new legislation. Section 18 of *The Builders' Lien Act*, S.S. 1984-85-86, B-7.1, states:

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82 *Ibid.*
83 *Macklem and Bristow, supra* fn. 4 at 398f.
84 *Ibid.* at 402.
85 *R. v. Brunner* (1960), 32 W.W.R. 478.
86 *The Saskatchewan Report* at 57.
87 [1955] O.W.N. 581 (Ont. H.C.).
88 *The Saskatchewan Report op. cit.*
89 Bristow, "Criminal Prosecutions under the Mechanics' Lien Act," 12 *Chitty's Law Journal* 197 (1963-64) at 198f.
90 *Supra* fn. 85.
91 [1983] 3. W.W.R. 318 (Man. P.C.).

18(1) Every person who is a trustee under this Part and who knowingly appropriates or converts any moneys constituting a trust under this Part to or for his own use or to or for any use inconsistent with the trust is guilty of an offence.

(2) Every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under subsection (1) is guilty of an offence.

(3) Every person who is guilty of an offence under subsection (1) or (2) is liable to a fine of not more than $50,000, to imprisonment for a term of not more than two years or to both such fine and imprisonment.

(4) A director or officer of a corporation may be charged with an offence under this section whether or not the corporation has been charged or convicted of the offence.

(5) The time limit for laying an information under this section is two years from the time when the offence occurred.

This provision is in essentials similar to the old penal section contained in predecessor legislation.[92] The $50,000 fine provided for in subsection (3) follows section 7 of Manitoba's *Builders' Lien Act*, S.M. 1980-81, c. 7. The criminal sanction prescribed in section 18 of the Saskatchewan legislation is in addition to a separate provision providing for civil liability in instances where there has been a breach of trust by a corporation.[93] The section calling for civil liability parallels section 13 of Ontario's *Construction Lien Act, 1983*.

This Commission takes the position that a provision similar to section 18 of the Saskatchewan legislation should be included in the trust provisions drafted for this jurisdiction. We agree with the view which David Bristow expressed as follows:

> The unscrupulous and dishonest contractor has been allowed to spawn too long in the building industry and will continue to propagate unless new laws are enacted or the existing laws utilized to combat and restrain him. It is respectfully submitted that before new legislation is enacted the existing provisions already in the statute be acted upon, and with the *Brunner* case as a guide, that prosecutions be launched in Ontario under the penal section of the Mechanics' Lien Act at least as a starting point

92 Saskatchewan *Mechanics' Lien Act*, R.S.S. 1978, c. M-7, s. 6; cf. Ontario *Mechanics' Lien Act*, R.S.O. 1980, c. 261, ss. 3(7).

93 *The Builders' Lien Act*, S.S. 1985-86-87, c. 7.1, s. 16.

toward the ultimate removal of this type of contractor from Canada's greatest single industry.[94]

We believe that diligent enforcement of a penal provision would go some way to ensuring that trust funds are not directed for purposes inconsistent with the trust.[95]

(e) Priorities on Insolvency

As discussed above, section 87 of the *Construction Lien Act, 1983* provides that where a payer becomes insolvent, the trust fund of which that payer is trustee is to be distributed so that priority is given over all others to a beneficiary of that trust who has proved a lien. As amongst the members of this class, priority in distribution of trust funds is in accordance with the priority of their liens. The balance of the trust fund, should there be any, is to be distributed amongst the remaining beneficiaries who do not have liens in accordance with the priorities that would have applied had their liens been proved.[96]

The priority regime set forth in this section establishes a direct connection between the lien and the trust provisions.[97] This is somewhat at odds with the decision of the Supreme Court of Canada in *Minneapolis-Honeywell Regulator Co. Ltd.* v. *Empire Brass Manufacturing Company Ltd.*[98] In that case it was argued that failure by a potential lien claimant to file his lien within the prescribed time period prejudiced not only his right to a lien but also his rights under the trust provisions. This argument had been accepted at the appellate level in British Columbia. The Supreme Court of Canada rejected it, however. That Court held that failure to comply with the lien provisions did not affect the rights of the trust beneficiary.[99] Commenting on this decision in its 1972 Report on mechanics' liens, the Law Reform Commission of British Columbia said:

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94 *Supra* fn. 89 at 199.

95 See generally the *Manitoba Report* at 43f. The Law Reform Commissioners in that jurisdiction said:

> There was a request for better enforcement of the trust provisions and harsher penalties for breach of trust obligations in the submissions respecting the working paper. Also, the consultant has recommended better enforcement and harsher penalties. Apparently these concerns are shared in other jurisdictions where the penalty for breach of trust has been increased to fines of up to $5,000 and imprisonment for periods of up to two years . . . We also strongly recommend that in future the Attorney-General more diligently prosecute offenders under this Part.

96 *Supra* at 956.

97 As to jurisdiction and procedure, however, subsection 50(2) of *The Construcion Lien Act, 1983* provides:

> A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

98 *Supra* fn. 2.

99 *Ibid.* See Locke J. at 703-704.

> Rand J. held that the plaintiffs were entitled to be treated as trust beneficiaries despite their failure to file a lien. It is, therefore, settled law that the object of the trust provision is to provide protection to trust beneficiaries independent of the protection provided by the existence of the right to claim a lien.
>
> The Commission agrees with this view. One of the most obvious situations in which the trust provision may give protection is where the right to file a lien has lapsed.[100]

The Commission recommended that the right to assert the existence of a trust should be unaffected by the fact that the time limited for filing a lien had expired.[101]

The ostensible reason behind the regime set up in section 87 is that since diligence is required for the preservation and perfection of liens it is only fair that priority be given to those who have taken care to protect their interests.[102] The *Saskatchewan Report* questioned the force of this argument. It said:

> Is due diligence really a factor with respect to those funds in excess of the holdback? The Committee did not feel that there was any hardship imposed upon a trustee in deciding how to pay if some of the beneficiaries have registered mechanics' liens and some have not. As will be discussed in the context of the lien on land, there are procedures developed to prevent the trustee from being in breach of trust. With the law as established by the *Minneapolis-Honeywell* case, the fact that a claimant has not registered a lien does not affect his right to be a trust beneficiary and commence action. Accordingly, a trustee, who must resolve the problem of the lien, has the alternative of paying moneys into court to cover the lien, paying the lien claimant directly if the trustee is the owner or run the risk of contending with the lien later and pay all beneficiaries their proportionate shares. The trustee does so not because of the trust provisions but because of the provisions related to the lien on land. Generally, the Committee was opposed to the establishment of priority among lien claimants. Those claimants who most often fail to register liens, namely labourers, would be adversely affected by the creation of a priority among lien claimants.[103]

The Committee recommended that the expiry of the lien period should not affect a trust beneficiary's right to assert his claim against the trustee or a third party acting in breach of the trust nor should it create a priority amongst trust beneficiaries.

This Commission is in agreement with the law as stated in *Minneapolis-Honeywell* and with the position adopted in the *Saskatchewan Report*. We

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100 *The British Columbia Report* at 92.
101 *Ibid.*
102 *Supra* at 96.
103 *The Saskatchewan Report* at 40-41.

are of the view that on insolvency the normal rules of equity should apply and that payments amongst beneficiaries should be made on a ratable basis.[104]

The Commission recommends that:

30. The remedies of the lien against land and the holdback provided by the present *Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be reinforced by the inclusion of trust provisions.

31. Subject to the qualifications outlined in the immediately following recommendation, Part II of the *Construction Lien Act, 1983* constitutes an appropriate model for such provisions.

32. The following qualifications are desireable:

(a)the right of set-off outlined in section 12 of the *Construction Lien Act, 1983* should be limited to debts, claims or damages incurred in respect of the improvement;

(b)the trust provisions should contain a limitation period of one year, which period is to run from the completion or abandonment of the contract and at the termination of that period the right of action is to be not only barred but also extinguished;

(c)in cases involving breach of trust, provision should be made for both civil and penal sanctions.

33. The legislation should not contain an express exemption in favour of lenders from liability in constructive trustee situations. The Commission is in agreement with the law as articulated in *Carl B. Potter Ltd.* v. *Mercantile Bank of Canada* and in *Perlmutter Shore Ltd.* v. *Bank of Montreal.* Where a bank is in possession of sufficient information to be put on inquiry, it should be held liable as a constructive trustee if it misapplies funds to a pre-existing indebtedness.

34. Newfoundland should not adopt the priority rule contained in section 87 of the *Construction Lien Act, 1983*. For purposes of distribution of trust funds on insolvency, the expiry of the lien period should not create a priority amongst trust beneficiaries.

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104 See Macklem and Bristow, *supra* fn. 4 at 403 and *supra* fn. 50.

CHAPTER 6

CONCLUDING REMARKS

In this Chapter we bring together for discussion a miscellany of issues. Included are matters raised by a number of parties who made representations to us. Though the questions examined are not ones that were expressly articulated in the ministerial reference to us, they may be regarded as arising incidentally from it. Moreover, they are issues that may be disposed of relatively quickly. We propose to round out our study by indicating the Commission's position in respect of them.

1. Liens On Chattels

At common law, when a person bestows skill, labour or money upon personal property, a lien attaches which gives that person the right to retain possession of the property until the reasonable charges for his services have been paid or satisfied, provided such lien is not inconsistent with the terms of the contract of repair.[1] Section 48 of this Province's *Mechanics' Lien Act* recognizes this common law possessory lien and provides, in addition, a right to sell on satisfaction of certain conditions. The section states:

> 48. (1) Every person who has bestowed money, skill or materials upon any chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon the chattel or thing for the amount or value of the money or skill and materials bestowed, has, while the lien exists but not afterwards in case the amount to which he is entitled remains unpaid for three months after it ought to have been paid, the right, in addition to any other remedy to which he may be entitled, to sell by auction the chattel or thing on giving one week's notice by advertisement in *The Newfoundland Gazette* and in a newspaper circulating in the place in which the work was done, setting forth the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence, if any, of the owner.
>
> (2) A person referred to in subsection (1) shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale and shall, upon application, pay over any surplus to the person entitled thereto.

It is important to recognize that section 48 does not create the lien. This arises usually by implication of law and is grounded in possession. In *Weir*

1 *Bevan v. Waters* (1828) Moo. and M. 235, 173 E.R. 1143; *Chase v. Westmore* (1816), 5 M. and S. 180.

and Lewisport Shipyards v. Bank of Nova Scotia et. al, Goodridge J. (as he then was) said: "[T]he section . . . does not create a lien insofar as the repair of chattels is concerned but creates a statutory right to sell a chattel in the possession of a lienholder exercising common law rights to retain possession."[2]

It has been suggested that section 48 is anomalous within the context of *The Mechanics' Lien Act* as the provision deals with personal rather than real property and does not create a lien, as the *Act* proper does,[3] but rather gives the right to sell and sets forth a procedure for such sale. On review of a similar section in its *Mechanics' Lien Act*, the Ontario Law Reform Commission said in their 1972 *Report on the Non-Possessory Repairman's Lien*:

> We have concluded that since the main concern of *The Mechanics' Lien Act* is with a lien attaching to land as a result of work being done or materials being furnished in the course of building construction, section 48 [now section 52] of *The Mechanics' Lien Act* and any provisions dealing with a non-possessory lien should preferably be contained in a new statute. Liens in the hands of repairmen of chattels are essentially a separate subject from liens in favour of people engaged in building construction, and we are of the opinion that, as such, they are better governed by a separate Act.
>
> We therefore recommend that section 48 of *The Mechanics' Lien Act* be repealed and that a new statute be enacted, a suggested title of which would be "The Repairman's Lien Act", the first part of which would contain provisions comparable to those contained in section 48 (subject to changes to be discussed below) recognizing the common law possessory lien in hands of a repairman of any chattel and conferring a power of sale, and the second part of which would contain the provisions necessary to create a non-possessory lien and which will be discussed later in this chapter.[4]

The recommendations contained in the Report of the Law Reform Commission have not, to date, resulted in new legislation in Ontario. Section 91 of the *Construction Lien Act, 1983* which repealed the *Mechanics' Lien Act* left unaffected the provision dealing with liens on chattels. The explanatory comment of the *Committee Report* in respect of section 91 is as follows:

> This section provides for the repeal of the *Mechanics' Lien Act*. The Committee is informed that section 52 [former section 48], which provides a repairer's lien, is to be retained, as a separate statute, pending the development of new legislation in this area.[5]

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2 (1981), 30 Nfld. & P.E.I.R. 223 at 250(Nfld. SCTD).
3 *Clarkson Co. v. Ace Lbr. Ltd.*, [1963] O.R. 748, *supra* Ch. II at 11.
4 The Ontario Law Reform Commission, *Report on The Non-Possessory Repairman's Lien* (1972); hereinafter referred to as "The Ontario Repairman's Lien Report."
5 *The Committee Report* at 209.

In a number of Canadian jurisdictions, liens on chattels are dealt with in separate statutes. New Brunswick, for example, has the *Liens on Goods and Chattels Act*, R.S.N.B. 1973, c. L-6; Manitoba, the *Garage Keepers' Act*, R.S.M. 1970, c. G-10; Alberta, the *Garagemen's Lien Act*, R.S.A. 1980, c. G-1; and British Columbia, the *Repairers' Lien Act*, R.S.B.C. 1979, c. 363. In addition to recognizing possessory liens and creating a right and procedure for sale, these statutes often provide for *non-possessory liens* in some circumstances. Section 3 of the British Columbia legislation is a case in point.[6]

This Commission is of the view that liens on chattels fit uneasily within the conceptual context of mechanics' lien legislation, the essential concern of which is liens in respect of realty. We indicated in our *Working Paper* that we agree with the recommendation contained in the 1972 Ontario Law Reform Commission *Report* that section 48 would be better placed in a separate enactment with a new name. We indicated also that given the fact that liens on chattels arise within the context of a wide variety of trades, *The Repairers' Lien Act* would perhaps be a more appropriate title for such a statute than the *Garage Keepers' Lien Act* or the *Garagemans' Lien Act*.[7] Both of these recommendations were well received. We are prepared to confirm them.

Should the Commission's recommendation in respect of a *Repairers' Lien Act* be implemented, thought might also be given to inclusion of a provision along the lines of section 3 of the British Columbia legislation providing for the creation of *non-possessory liens* in some circumstances. We make, however, no formal recommendation in this regard as non-possessory liens are without the ambit of this study.

The Commission recommends that:

35. Section 48 of *The Mechanic's Lien Act* dealing with liens on chattels should be repealed and a new statute enacted, a suggested title of which

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6 Section 3 of the British Columbia's *Repairers' Lien Act*, R.S.B.C. 1979, c. 363 states:

> If a garage keeper, before surrendering possession of a motor vehicle, aircraft, boat or outboard motor, obtains from the person at whose request he has bestowed money or skill or materials onit an acknowledgment of indebtedness by requiring that person to sign an invoice or other statement of account, he does not, by surrendering possession of the motor vehicle, aircraft, boat or outboard motor, lose any lien for the indebtness acquired by him on it. However, the lien, on the expiation of 15 days after possession is surrendered, ceases to exist unless, in the meantime, he causes an affidavit of lien to be filed in the offence of the Registrar General at Victoria.

7 See *The Ontario Repairman's Lien Report* at 9 fn. 13 where the following instances in which liens have been held to arise are referred to:

> Repairs to automobile: *Commercial Finance Corporation v. Stratford* (1920), 47 O.L.R. 392; repairs to a vessel: *Hackett v. Coghill* (1902), 2 O.W.R. 1077; work done on furniture: *Hayward v. G.T.R. Co.* (1872), 32 U.C.Q.B. 392; services performed upon a horse: *McBride v. Bailey* (1857), 6 U.C.C.P. 523.

would be *The Repairers' Lien Act*, which would contain provisions comparable to those contained in present section 48.

2. Drafting

At various places throughout this *Report* reference has been made to the fact that we encountered a great deal of discontent as to the language in which *The Mechanics' Lien Act* is couched amongst those who use and are affected by the Act on a daily basis. The charge was made that despite their best efforts diligent laypersons could not help but be frustrated by the opaque terminology of the legislation. It was suggested that steps be taken to make the statute, and the system of rights and obligations it sets forth, more transparent.

The Brief of the Newfoundland Association of Architects was quite explicit in this regard:

> Since architects must have a clear understanding of the Mechanics' Lien Act which impacts quite onerously on their routine operations in contract administration, and with which they must grapple when liens are registered and actioned, it is imperative that the Act be rewritten in plain English, without obfuscation and without ambiguity or error. While it is recognized that legal documents must be very carefully written, surely most lawyers would agree with all architects respecting this issue concerning the Act.[8]

The Brief goes on to list a number of examples of sections which give rise to confusion and concludes with the following suggestion:

> If legally acceptable, there should be at the beginning of the Act a very brief abstract or summary in the clearest possible lay terms giving all of the more significant points covered in the Act, expressing its purpose and its application, with cross references to the text as appropriate. Such abstracts have been most successfully done for other complex legal documents such as building codes.[9]

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8 *Mechanics Lien Legislation: Review by the Newfoundland Association of Architects for the Newfoundland Law Reform Commission* (December 1984) at 3.

9 *Ibid.* at 4.

We have adverted above to the fact that judicial notice has been taken of the "dreadful legislative drafting"[10] evidenced in some of the provisions of the present Act.

This Commission is sympathetic to these criticisms. *The Mechanics' Lien Act* currently in place in this Province, and the earlier Ontario Act on which it was modelled, were products essentially of the nineteenth century. Their language was the language of another age. This said, however, it must be recognized that mechanics' lien legislation is in a sense inevitably technical. This is due in no small part to the complex nature of the activities it attempts to regulate. Even the *Construction Lien Act, 1983*, which purports to provide new legislation for a new age, is not without its critics.[11]

The recommendations which we have made throughout this *Report* would, if implemented, result in new lien legislation for this Province. We believe that with knowledgeable drafting, the new statute, despite inevitable technicalities, can be made to satisfy the many demands which we received for clarity and consistency. We note that legislative Counsel's Office in this Province has recently adopted the practice of placing at the beginning of new legislation a comprehensive *Analysis* intended to give a short hand reference to each section of the Act. This Analysis comprises the marginal sidenotes to each section. We believe this drafting convention to be extremely useful. It addresses in part the concerns contained in the Association of Architect's Brief. When combined with modern English, and systematic and careful drafting, it should result in a statute that is more accessible to those who are directly afftected by it.

The Commission recommends:

36. In drafting new lien legislation for this Province, every effort should be made to ensure clarity of language. The new Act should be accompanied by a systematic and comprehensive *Analysis*.

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10 *Supra* Ch. 3 Section 4. (a)(ii) at 40. *McLoughlan Supplies Ltd. v. Elliston Developments Ltd. et. al.* (1988), 30 C.L.R. 141 (Nfld. S.C.T.D., per Steele J.).

11 See D.I. Bristow and R. Barnard, "Interpretation of the Construction Lien Act," (1986) 17 C.L.R. 73. In the opening paragraph of their article, the authors state:

> In view of the number of changes introduced by the new legislation, it is appropriate to consider how the new statute should be interpreted and its relationship to the Mechanics' Lien Act, R.S.O. 1980, c. 261, which it is replacing. For those involved in the function of writing statutes, the words "interpreting the statute" will no doubt give rise to all kinds of apprehensions because the very phrase implies that the text is capable of supporting more than one meaning which, in turn, implies that the text is less than clear. Regrettably, but realistically, and despite the best efforts of the draftsmen, ambiguities and lack of certainty of meaning will arise, particularly during the first few years of a statute's enactment. This is especially true for a long and essentially technical piece of legislation like the Construction Lien Act, S.O. 1983, c. 6.

3. Name of Statute

A number of jurisdictions across Canada have moved to rename their mechanics' lien legislation. We have seen that Alberta, British Columbia, Manitoba and Saskatchewan have adopted the title *Builders' Lien Act* while Ontario has opted for *Construction Lien Act*.[12] We believe that both of these alternatives are more appropriate in describing the content of this kind of legislation than the title of our existing Act. We are of the view that from the layperson's perspective the interests of clarity would be well served by renaming our legislation. What should the new name be?

Though some thought was given to devising an entirely original title, we determined after some discussion that such would be contrary to the interests of uniformity. We resolved ultimately to follow the lead of our western brethren and to recommend that this Province's *Mechanics' Lien Act* be renamed *The Builders' Lien Act.*

The Commission recommends that:

37. The new lien legislation to be prepared for this Province should not be called *The Mechanics Lien Act.* In the interest of accesibility the title of the new Act should be *The Builder's Lien Act.*

12 *Supra* Ch. 3 at 32-33.

CHAPTER 7

SUMMARY OF RECOMMENDATIONS

Set out below is a summary of the Commission's recommendations in respect of reform of this Province's mechanics' lien legislation. The Chapter and page at which each recommendation is located in the body of the *Report* is indicated at the end of each recommendation.

1. In the present economic atmosphere and in the absence of strong or any evidence warranting same, mechanic lien legislation should not be abolished. However, *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be repealed and replaced by a new statute contemporary in language and incorporating the changes which the Commission proposes. The new Act should be drafted, in such a manner as to be accessible to non-lawyers. It should establish clearly, concisely and precisely the rights of all the parties affected by it. (Chapter 1, p. 9)

2. All waivers of lien rights should be declared void and contrary to public policy. (Chapter 2, p. 14)

3. Lien protection should be extended to those, including architects and engineers, who supply designs plans drawings or specifications that in themselves can be proven to enhance the value of the owner's interest in the land, whether or not the intended construction or improvement proceeds.(Chapter 2, p. 17)

4. Residential home buyers should be expressly excluded from the definition of "owner" contained in section 2(1)(i) of *The Mechanics' Lien Act*, R.S.N. 1970, c.229; they should be exempt from the holdback requirements otherwise applicable under the legislation. Suppliers should be protected by new trust provisions. (Chapter 2, p. 23)

5. It is not necessary that Section 110(2) of *The Workers' Compensation Act, 1983* be amended to expressly provide that, for purposes of that section, the holdback is not property of the person to whom the assessment is charged. (Chapter 2, p. 26)

6. The holdback remedy should not be eliminated. However, its efficiency should be improved to expediate the flow of contract moneys throughout the construction pyramid. (Chapter 3, p. 31)

7. The 10 percent holdback currently required by Section 13 of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should remain as pegged at its present level. (Chapter 3, p. 35)

8. The doctrine of substantial performance should be retained; however, it should be consistently incorporated throughout the Act. Clarification in respect of its ambit and application is required particularly as regards the expiration of lien rights and release of the holdback. (Chapter 3, p. 41)

9. In any new lien legislation passed in the Province, Subsections 13(1) and 23(1) of *The Mechanics' Lien Act* should be amended so as to clearly provide for release of the holdback upon expiry of the relevant statutory period. (Chapter 3, p. 47)

10. Where it is intended that release is dependent upon "substantial performance," these words should be used. In the interest of clarity and consistency, the words "the work done or to be done" contained in subsection 13(1) of the present Act should be removed. The definition of "completion of the contract" contained in subsection 2(1) of The Mechanics' Lien Act should be repealed. (Chapter 3, p. 47)

11. The doctrine of substantial performance should not apply to subcontracts. However, the early release of holdback on completed subcontracts should be retained. Greater use of this release mechanism should be encouraged. (Chapter 3, p. 47)

12. Section 31 of Ontario's *Construction Lien Act, 1983* provides, with appropriate amendment, a suitable model for recasting subsections 23(2), 23(3) and 23(4) of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229. (Chapter 3, p. 47)

13. The following rules should govern the certification of a contract as substantially performed:

(a) where the contract is under the supervision of a payment certifier, the payment certifier should be required to certify substantial performance of the contract;

(b) where the contract is not under the supervision of a payment certifier, the owner and contractor jointly should be required to certify substantial performance;

(c) the certificate of substantial performance should be provided within a reasonable time after receipt of a demand by a contractor;

(d) where the payment certifier or owner/contractor fail to certify substantial performance, access to the Courts should be allowed;

(e) the content and form of the certificate should be prescribed by regulation; and

(f) the certificate of substantial performance should be published once in the *Newfoundland Gazette*. (Chapter 3, p. 52)

14. The lien preservation period for work, services or materials supplied before the date of substantial performance should expire upon termination of the statutory period following the earlier of:

(a) in the case of a contractor, 1. publication of the certificate in the *Gazette* and 2. completion or abandonment of the contract; and

(b) in the case of any other person, 1. publication of the certificate in the *Gazette*, 2. the date a subcontract is certified to be completed, where the services or materials were supplied under or in respect of that subcontract, and 3. the last provision of work, services or materials. (Chapter 3, p. 53)

15. The criteria with respect to determining substantial performance contained in subsection 2(2) and 2(3) of the present *Mechanics' Lien Act* should remain with the following amendments:

(a) the dollar amount should be increased from $250,000 to $500,000;

(b) instead of the contract being presumed to be substantially performed upon the happening of events, the contract should be declared to be substantially performed upon the happening of the events listed. (Chapter 3, p. 53)

16. The mechanism for certification of completion of subcontracts, as provided in subsection 13(2)-13(4) of *The Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be recast on the model of Section 33 of Ontario's *Construction Lien Act, 1983*. (Chapter 3, p. 55)

17. The Province's lien legislation should be amended to allow for the introduction of a late trades holdback, which holdback is to provide protection for late suppliers. The fund so constituted is to be subject only to the liens of persons providing services or materials from the day of substantial performance until total completion of the contract. (Chapter 3, p. 57)

18. Where a person supplies services and materials both before and after the date of substantial performance, the lien in respect of services or materials supplied before the date of substantial performance will terminate upon expiry of the statutory period following substantial performance of the main contract. The lien in respect of services or materials supplied after the date of substantial performance will terminate upon expiry of the statutory period following the earliest of (i) the date of last supply, (ii) the date the contract is completed, and (iii) the date the contract is abandoned. (Chapter 3, p. 57)

19. The Province's lien legislation should be amended to allow for the introduction of a definition of completion of the contract immediately after the definition of substantial performance. This definition should provide that for the purposes of the Act a contract is deemed to be complete and services

or materials last supplied when the price of completion or last supply is not more than the lesser of (i) 1 percent of the contract price, and (ii) $1,000. (Chapter 3, p. 57-58)

20. A provision permitting the release of holdback on contracts, the value of which exceeds 20 million dollars (or such greater amount as may be prescribed) on the yearly anniversary of when services or materials are first provided should be incorporated into the mechanics' lien law of this Province. Section 45 of *The Builders' Lien Act*, SS. 1984-85-86, B-7.1, with appropriate amendment, is a suitable model for such a provision. (Chapter 3, p. 60)

21. The Province's lien legislation should be amended so as to provide for a lien-preservation/holdback retention period of 45 days. (Chapter 3, p. 65)

22. For work, services or materials supplied *before* the date of substantial performance of the main contract, the lien preservation period should expire upon termination of the forty-vie day period following the earliest of: (a) in the case of a contractor: (i) publication of the certificate in the Gazette; (ii) publication of notice in the Gazette of the yearly anniversary of a contract exceeding 20 million dollars; (iii) the last provision of work services or materials and (iv) the date a subcontract is certified to completed where the services or materials were supplied under or in respect of that subcontract. (Chapter 3, p. 65)

23. For work, services or materials supplied *after* the date of substantial performance of the main contract or, in the case of contracts exceeding 20 million dollars, where the unexpired term of the contract is less than one year from the last anniversary date of the contract, the lien preservation period should expire upon termination of the forty-five day period following the earlier of: (a) in the case of the contractor: (i) the date the contract is completed; and (ii) the date the contract is abandoned; (b) in the case of any other person: (i) the date of last supply of services or materials; and (ii) the date a subcontract is certified to be completed where the services or materials were supplied under or in respect of that subcontract. (Chapter 3, p. 65)

24. The ninety day period for commencing action as set forth in subsection 25(1) of the present Act should remain unaltered. (Chapter 3, p. 65)

25. The holdback should be secured by a realignment of priorities under subsection 16 (1) of the *Mechanic Lien Act* RSN 1970 C229 in such a manner that the lien is to rank in priority over any building mortgage to the extent of any deficiency in the holdback. (Chapter 3, p. 71)

26. Right to information provisions similar to section 39 of Ontario's *Construction Lien Act, 1983* should be included in any new lien legislation enacted in this Province. This provision should enable the person having a lien to require a mortgagee or unpaid vendor to provide sufficient details concerning any mortgage on the premises to enable him to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement. (Chapter 3, p. 71)

27. The Province's lien legislation, should be amended so as to provide that the Crown is bound thereby. "Crown" should be defined to include a Crown agency. (Chapter 4, p. 81)

28. The amending provisions dealing with liens against the Crown should clearly state that where the Crown is an owner within the meaning of the Act the lien does not attach to the estate or interest of the Crown in the premises but constitutes instead a charge upon the holdback. This would have the affect of making Subsection 13(5) of the present Act applicable to the Crown generally. (Chapter 4, p. 81)

29. The sixty day notice period contained in section 23 of *The Proceedings Against the Crown Act*, S.N. 1973, No. 59, and the thifty day notice provisions contained in the government department Acts listed at page 275 of this Commission's *Working Paper on Limitation of Actions* (NLRC-WP1) should not apply in respect of an action against the Crown under *The Mechanics' Lien Act*. (Chapter 4, p. 81)

30. The remedies of the lien against land and the holdback provided by the present *Mechanics' Lien Act*, R.S.N. 1970, c. 229, should be reinforced by the inclusion of trust provisions. (Chapter 5, p. 111)

31. Subject to the qualifications outlined in the immediately following recommendation, Part II of the *Construction Lien Act, 1983* constitutes an appropriate model for such provisions. (Chapter 5, p. 111)

32. The following qualifications are desireable:

(a)the right of set-off outlined in section 12 of the *Construction Lien Act, 1983* should be limited to debts, claims or damages incurred in respect of the improvement;

(b)the trust provisions should contain a limitation period of one year, which period is to run from the completion or abandonment of the contract and at the termination of that period the right of action is to be not only barred but also extinguished;

(c)in cases involving breach of trust, provision should be made for both civil and penal sanctions. (Chapter 5, p. 111)

33. The legislation should not contain an express exemption in favour of lenders from liability in constructive trustee situations. The Commission is in agreement with the law as articulated in *Carl B. Potter Ltd.* v. *Mercantile Bank of Canada* and in *Perlmutter Shore Ltd.* v. *Bank of Montreal*. Where a bank is in possession of sufficient information to be put on inquiry, it should be held liable as a constructive trustee if it misapplies funds to a pre-existing indebtedness. (Chapter 5, p. 111)

34. Newfoundland should not adopt the priority rule contained in section 87 of the *Construction Lien Act, 1983*. For purposes of distribution of trust funds on insolvency, the expiry of the lien period should not create a priority amongst trust beneficiaries. (Chapter 5, p. 111)

35. Section 48 of *The Mechanic's Lien Act* dealing with liens on chattels should be repealed and a new statute enacted, a suggested title of which would be *The Repairers' Lien Act*, which would contain provisions comparable to those contained in present section 48. (Chapter 6, p. 115-116)

36. In drafting new lien legislation for this Province, every effort should be made to ensure clarity of language. The new Act should be accompanied by a systematic and comprehensive *Analysis*. (Chapter 6, p. 117)

37. The New lien legislation to be prepared for this Province should not be called *The Mechanics Lien Act*. In the interest of accessibility the title of the new Act should be *The Builder's Lien Act*. (Chapter 6, p. 118)

APPENDIX A

Appendix A

On receipt of this reference from the Minister of Justice for the Province, the Commission requested input from the construction industry and allied professions. We gratefully acknowledge the thoughful comments received from the following:

The Association of Professional Engineers of Newfoundland

The Architects' Guild Ltd., Charles H. Cullum

The Canadian Bankers' Association, Newfoundland Branch

City of St. John's, James J. Finn, Director (Engineering and Works)

City of St. John's, Paul R. Stapleton, City Solicitor

Ron Cole, Chairperson, Symposium on Construction Bonding, Insurance, Mechanics' Lien, November 5 - 7, 1985

Creditel, Rodger D. Noel

Dicks and Associates, Paul D. Dicks

Harvey & Company Limited, John M. Gardner

Law Society of Newfoundland

Newfoundland Association of Architects

Newfoundland Light and Power Co. Limited

Newfoundland and Labrador Construction Association

Newfoundland and Labrador Hydro

Newfoundland and Labrador Roadbuilders Association

Poole, Althouse, Clarke, Thompson & Thomas; Joseph R. Hutchings

Poole, Althouse, Clarke, Thompson & Thomas; Edward P. Poole, Q.C.

Special Committee of The Law Society with Respect to *The Mechanics' Lien Act*

St. John's Board of Trade

Stagg, Stagg & Marks; Fred R. Stagg

Judge David G. Riche

Workers' Compensation Commission

The Commission gratefully acknowledges the thoughtful comments received from the following during hearings held at the Colonial Building, St. John's, Newfoundland, on February 26, 1986:

Fred Bishop, Solicitor, Newfoundland and Labrador Hydro

Paul C. Cahill, St. John's Board of Trade

Ron Cole, Solicitor, Department of Justice

John G. Dawe, Project Engineer, (Engineering and Works) City of St. John's

William Gillies, Q.C., Registrar, Registry of Deeds, Companies and Securities

Ian Kelly, Special Committee of the Law Society with Respect to the Mechanics' Lien Act

P. Alan Lorhan, Reed Stenhouse Limited

Ronald S. Noseworthy, Q.C., Special Committee of the Law Society with Respect to the Mechanics' Lien Act

E. Bruce Peckford, Executive Director, Workers' Compensation Commission

Ernest G. Reid, Q.C., Canadian Bankers' Association

Wayne Spracklin, Newfoundland and Labrador Construction Association

Ronald Stevenson, Canadian Bankers' Association

APPENDIX B

Appendix B

The Commission gratefully acknowledges the thoughtful comments received from the following in response to our *Working Paper on The Mechanics' Lien Act: Certain Substantive Issues* (NLRC-WP3, April 1988):

Association of Professional Engineers of Newfoundland

Atlantic Building Supply Dealers Association

Canadian Bankers' Association, Newfoundland Branch

Department of Public Works and Services

Fishery Products International Limited

The Law Society of Newfoundland

Newfoundland and Labrador Construction Association

Newfoundland and Labrador Construction Association: General Contractors

Seabord Construction

St. John's Board of Trade

The Hon. Mr. Justice Zelling, Law Reform Committee of South Australia

APPENDIX C

Appendix C

The Mechanic Lien Act

Analysis

Section:

1. Short title
2. Definitions
3. Agreements waiving application of Act are void
4. Effect upon 3rd party of agreement waiving lien
5. Exception of public streets, roads or highways
6. Non-application of Act
7. General right to a lien
8. Lien for rented equipment
9. Where estate charged is leasehold
10. Application of insurance on that property
11. Limit of amount of owner's liability
12. Limit of lien when claimed by other than contractor
13. Holdback
14. Payments made directly by owner to persons entitled to lien
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19. What may be included in claim
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28. Effect of taking security
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AN ACT RESPECTING THE LIENS OF MECHANICS AND OTHERS

The within **consolidation** of *The Mechanics' Lien Act* has been prepared for the Commission's internal purposes.

Short title

1. This Act may be cited as The Mechanics' Lien Act.

RSN1970 c229 s1

Interpretation

Interpretation

2. (1) In this Act

(a) "completion of the contract" means, subject to subsections (2) and (3) of this section, substantial performance, not necessarily total performance, of the contract;

(b) "contractor" means a person contracting with, or employed directly by, the owner or his agent for the doing of work or the placing or furnishing of materials for any of the purposes mentioned in this Act;

(c) "corporation" includes a municipal authority and a railway company;

(d) "court" means the Trial Division;

(e) "doing of work" includes the performance of a service, and corresponding expressions have corresponding meanings;

(f) "judge" means a judge of the court;

(g) "materials" includes every kind of movable property;

(h) "municipal authority" includes

(i) the City of St. John's,

(ii) the Corner Brook City Council,

(iii) the Mount Pearl City Council,

(iv) The St. John's Metropolitan Area Board,

(v) the council of a town, community, region or local service district committee established or continued under the *Municipalities Act;*

(i) "owner" includes a person having an estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and

(i) upon whose credit,

(ii) on whose behalf,

(iii) with whose privity or consent, or

(iv) for whose direct benefit

work is done or materials are placed or furnished and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is begun or the materials placed or furnished have started to be placed or furnished;

(j) "person" includes a corporation;

(k) "registrar" means the Registrar of Deeds referred to in the *Registration of Deeds Act* and includes the Deputy Registrar of Deeds;

(l) "registry" means the Registry of Deeds referred to in the *Registration of Deeds Act;*

(m) "subcontractor" means a person not contracting with or employed directly by the owner or his agent for a purpose mentioned in this Act, but contracting with or employed by a contractor or, under him, by another subcontractor and "subcontract" has a corresponding meaning;

(n) "wages" means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits, whether by statute, contract or collective bargaining agreement; and

(o) "workman" means a person employed for wages in any kind of labour, whether employed under a contract of service or not.

(2) For the purposes of this Act, a contract shall be deemed to be substantially performed

(a) when the work or a substantial part of the work is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than

(i) 3% of the lst $250,000 of the contract price,

(ii) 2% of the next $250,000 of the contract price, and

(iii) 1% of the balance of the contract price.

(3) For the purposes of this Act, where the work or a substantial part of the work is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

RSN1970 c229 s2;1971 c14 s2;1971 No47 s2;
1979 c33 Sch C;1986 c42 s153 Sch B item 51

Administration

Administration.

3. The Minister of Justice is charged with the administration of this Act.

Application

Agreements waiving application of Act are void.

4. (1) Every agreement, oral or written, expressed or implied, on the part of any workman, that this Act, or any part of it, shall not apply to, or that a remedies, or any remedy, provided by it shall not be available for the benefit of, such workman, or which in any way limits or abrogates or in effect limits, modifies or abrogates any such remedy, is null, void and of no effect.

Exception.

(2) Subsection (1) does not apply to

(a) a manager, officer or foreman or

(b) a person whose wages are more than $50 a day.

RSN1970 c229 s4

Effect upon 3rd party of agreement waiving lien.

5. No agreement deprives any person, otherwise entitled to a lien under this Act and who is not a party to the agreement, of the benefit of the lien, but the lien attaches, notwithstanding such agreement.

RSN1970 c229 s5

Exception of public streets, roads or highways.

6. (1) Except for the purpose of Section 13, the lien given by subsection 7(1) does not attach to a public street, road or highway or to a work or improvement done on, in or to a public street, road or highway.

Definition.

(2) The expression "street", "road" or "highway" includes all land lying between the boundaries of the street, road or highway, as the case may be, whether designed or intended for vehicular or pedestrian traffic or not.

RSN1970 c229 s6

Non-application of Act

6A. (1) This Act does not apply to any work done or any materials placed or furnished under a contract or agreement executed before January 1, 1972, or to any work done or any materials placed or

furnished under any subcontract made under or by virtue of that contract or agreement, whether that subcontract is made prior or subsequent to January 1, 1972.

(2) Where, under subsection (1), this Act does not apply to any work or materials, *The Mechanics Lien Act,* R.S.N. 1952, is considered to remain in full force with respect to that work or materials, and all the consequences shall follow as if that Act were not repealed.

1971 No14 s2;1971 No47 s3

Creation of Liens

General right to a lien.

7. (1) Unless he signs an express agreement to the contrary, and in taht case subject to Section 4, where any person does any work upon or in respect of, or places or furnishes materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, a building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor, such person has, by virtue of doing such work or placing or furnishing such materials, a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied therby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

Lien attaches where materials incorporated into building.

(2) The lien given by subsection (1) attaches as set out in that subsection where the materials delivered to be used are incorporated into the land, building, structure or works, notwithstanding that the materials may not have been delivered in strict accordance with subsection (1).

Interpretation.

(3) For the purposes of subsection (1), "agent" includes the contractor or subcontractor for whom the materials are placed or furnished, unless the person placing or furnishing the materials has had actual notice from the owner to the contrary.

RSN1970 c229 s7

Lien for rented equipment.

8. A person who rents equipment to an owner, contractor or subcontractor for use on a contract site is deemed for the purposes of this Act, to have performed a service for which he has a lien for the price of the rental of the equipment used on the contract site, limited, however, in amount to the sum justly owed and due to the person entitled to the lien from the owner, builder, contractor or subcontractor in respect of the rental of the equipment.

RSN1970 c229 s8

Where estate charged is leasehold.

9. (1) Where the estate or interest upon which the lien attaches is leasehold, the fee simple is also subject to the lien if the person doing the work or placing or furnishing the material gives notice in writing, by personal service, to the owner in fee simple or his agent of the work to be done or material to be placed or furnished unless the owner in fee simple or his agent, within 15 days after the service on him of the said notice, gives notice in writing, by personal service, to such person that he will not be responsible therefor.

Effect on lien-holder of forfeiture or cancellation of lease.

(2) No forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, deprives a person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after he becomes entitled, and the amount paid may be added to his claim.

Prior mortgages.

(3) Where the land and premises upon or in respect of which work is done or materials are placed or furnished are encumbered by a mortgage or other charge that was registered in the registry before any lien under this Act arose, the mortgage or other charge has priority over all liens under this Act to the extent of the actual value of the land and premises at the time the 1st lien arose, such value to be ascertained by the judge.

When first lien arose.

(4) The time at which the 1st lien arose shall be deemed to be the time at which the 1st work was done or the 1st materials placed or furnished, irrespective of whether a claim for lien in

respect thereof is registered or enforced and whether or not that lien is before the court.

Future advances.

(5) A mortgage existing as a valid security, notwithstanding that it is a prior mortgage within the meaning of subsection (3), may also secure future advances, subject, however, to subsection 16(1).

Registered agreement for sale and purchase of land has same priority as mortgage.

(6) A registered agreement for the sale and purchase of land, and moneys in *bona fide* secured or payable thereunder has the same priority over a lien as is provided for a mortgage and mortgage moneys in subsections (3) and (5) and, for the purposes of this Act, the seller shall be deemed to be a mortgagee, and any moneys paid *bona fide* secured and payable under such agreement shall be deemed to be mortgage *bona fide* money secured or advanced.

RSN1970 c229 s9

Application of insurance on that property.

10. Where any of the property upon which a lien attaches is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or charge shall take the place of the property so destroyed and is, after satisfying any prior mortgage or charge in the manner and to the extent set out in subsection 9(3), subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in an action to enforce the lien.

RSN1970 c229 s10

Limit of amount of owner's liability.

11. Except as otherwise provided in this Act, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

RSN1970 c229 s11

Limit of lien when claimed by other than contractor.

12. Except as otherwise provided in this Act, where the lien is claimed by any person other than the contractor, the amount that may be claimed in respect thereof is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been done or the materials were placed or furnished.

RSN1970 c229 s12

Holdback.

13. (1) Subject to the other provisions of this section, in all cases, the person primarily liable upon a contract under and by virtue of which a lien may arise shall, as the work is done or the materials are furnished under the contract, retain for a period of 30 days after the completion or abandonment of the work done or to be done under the contract 10% of the value of the work and materials actually done, placed or furnished, as referred to in Section 7, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated, upon evidence given in that regard, on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work or materials.

Reduction in amount retained.

(2) In the case of a contract that is under the supervision of an architect, engineer or other person upon whose certificate, hereinafter in this subsection and in subsection (4) referred to as the "certificate", payments are to be made, where 30 days have elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 10% of the subcontract price or, if there is no specific subcontract price, by 10% of the actual value of the work done or materials placed or furnished under that subcontract, but this subsection does not operate if and so long as any lien derived under the subcontract is preserved by anything done under this Act.

Idem.

(3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction of that architect, engineer or other person has been given to that subcontractor, then for the purposes of subsections 23(1), (2) and (3) and for the purposes of Section 25, that subcontract and materials placed or furnished or to be placed or furnished thereunder that subcontract and work done or to be done thereunder shall, so far as concerns any lien thereunder of that subcontractor, be deemed to have been completed or placed or furnished not later than the time at which the certificate was so given.

Court order in lieu of certificate.

(4) Where an architect, engineer or other person neglects or refuses to issue and deliver a certificate upon which payments are

to be made under a contract or subcontract, the court, upon application and upon being satisfied that the certificate should have been issued and delivered, may, upon such terms and conditions as to costs and otherwise as it deems just, make an order that the work or materials to which the certificate would have related has been done or placed or furnished, as the case may be, and any such order has the same force and effect as if the certificate had been issued and delivered by the architect, engineer or other person.

Effect of lien on amounts retained.

(5) Where there is a lien under Section 7, the lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the moneys required to be retained are respectively payable and where there is no lien on the land by virtue of Section 6, a claim for work done or materials placed or furnished is a charge upon the amount directed to be retained by this section.

Payments made in good faith without notice of lien.

(6) All payments up to 90% as fixed by subsection (1) and payments permitted as a result of the operation of subsections (2) and (3) made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by 1 subcontractor to another subcontractor, before notice in writing of the lien given by the person claiming the lien to the owner, contractor or subcontractor, as the case may be, operate as a discharge *pro tanto* of the lien.

Payment of percentage and discharge of liens.

(7) Payment of the percentage required to be retained under this section may be validly made so as to discharge all claims in respect of that percentage after the expiration of the period of 30 days mentioned in subsection (1) unless in the meantime proceedings have been commenced to enforce a lien or charge against the percentage as provided by sections 24 and 25, in which case the owner may pay the percentage into court in the proceedings, and such payment constitutes valid payment in discharge of the owner to the amount thereof.

Amendment of contracts.

(8) Every contract shall be deemed to be amended in so far as is necessary to be in conformity with this section.

Where percentage not to be applied.

(9) Where the contractor or subcontractor makes default in completing his contract, the percentage required to be retained shall not, as against any lien claimant who by the virtue of subsection (5) has a charge thereupon, be applied by the owner, contractor or subcontractor to the completion of the contract or for any other purpose nor to the payment of damages for the non-completion of

the contract by the contractor or subcontractor nor in payment or satisfaction of any claim against the contractor or subcontractor.

RSN1970 c229 s13

Payments made directly by owner to persons entitled to lien.

14. If an owner, contractor or subcontractor makes a payment to a person entitled to a lien under Section 7 or to any person who but for Section 6 would be entitled to a lien under Section 7, for or on account of a debt, justly due to him for work done or for materials placed or furnished to be used as therein mentioned, for which he is not primarily liable, and within 3 days afterwards gives written notice of the payment to the person primarily liable, or his agent, the payment shall be deemed to be a payment on his contract generally to the contractor or subcontractor primarily liable but not so as to affect the percentage to be retained by the owner as provided by Section 13.

RSN1970 c229 s14

Rights of subcontractor.

15. Every subcontractor is entitled to enforce his lien, notwithstanding the non-completion or abandonment of the contract by a contractor or subcontractor under whom he claims.

RSN1970 c229 s15

Priority of lien.

16. (1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of a conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

Priority among lienholders.

(2) Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money is entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders ranks *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

Mortgage given to person entitled to lien void as against lienholders.

(3) Any conveyance, mortgage or charge of or on land given to any person entitled to a lien thereon under this Act in payment of or as security for any such claim, whether given before or after such lien claim has arisen, shall, as against other parties entitled to liens under this Act, on any such land be deemed to be fraudulent and void.

RSN1970 c229 s16

Priority of Wages.

Priority of wages

17. (1) Every workman whose lien is for wages has priority to the extent of 30 days' wages over all other liens derived through the same contractor or subcontractor to the extent of and on the percentage directed to be retained by Section 13 to which the contractor or subcontractor through whom the lien is derived is entitled, and such workmen rank thereon *pari passi*.

Enforcing lien in such cases.

(2) Every workman is entitled to enforce a lien in respect of any contract or subcontract that has not been completed, and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the proper persons, returnable in 4 days after service thereof before the court, that the applicant will, on the return of the motion, ask for judgment on his claim for lien, registered particulars of which shall accompany the notice of motion duly verified by affidavit.

Calculating percentage when contract not fulfilled.

(3) If the contract has not been completed when the lien is claimed by a workman, the percentage shall be calculated on the value of the work done or materials placed or furnished by the contractor or subcontractor by whom the workman is employed, having regard to the contract price, if any.

Devices to defeat priority of workman.

(4) Every device by an owner, contractor or subcontractor to defeat the priority given to a workman for his wages and every payment made for the purpose of defeating or impairing a lien is null, void and of no effect.

RSN1970 c229 s17

Registration

Registration of claim for lien.

18. (1) A claim for a lien may be registered in the registry and shall set out

(a) the name and address for service of the person claiming the lien and of the owner or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land, and of the person for whom the work was or is to be done, or the materials were or are to be placed or furnished, and the time within which the same was or was to be done or placed or furnished;

(b) a short description of the work done or to be done, or the materials placed or furnished or to be placed or furnished;

(c) the sum claimed as due or to become due;

(d) a description of the land.

Verification of claim.

(2) The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

Lien against railway.

(3) When it is desired to register a claim for lien against a railway, it is sufficient description of the land of the railway company to describe it as the land of the railway company.

Particulars of claims to be registered.

(4) The registrar shall register a claim for lien by causing the claim to be numbered and to be endorsed with a memorandum of the day, hour and minute of filing, and to be indexed by entering in alphabetical order in a register to be kept by him the number of the claim, the names of the parties to the claim, the day, hour and minute of filing, and the position, with identifying particulars, of the property affected, and the file reference and thereafter he shall keep the claim on file and the registrar shall stamp a duplicate, if provided by the applicant, certifying the fact and the day, hour and minute of filing.

RSN1970 c229 s18;1974 No84 s18

What may be included in claim.

19. (1) A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite in the claim, but, where more than 1 lien is included in 1 claim, each claim for lien shall be verified by affidavit as provided in Section 18.

Apportionment of claims.

(2) The court has jurisdiction equitably to apportion against the respective properties the amounts included in any claim or claims under subsection (1).

RSN1970 c229 s19

Informality in registering liens.

20. (1) Substantial compliance with Sections 18, 19 and 31 is sufficient, and no claim for lien is invalidated by reason of failure to comply with any of the requirements of such sections unless, in the opinion of the judge, the owner, contractor or subcontractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

Registration necessary.

(2) Nothing in this section dispenses with the requirement of registration of the claim for lien.

RSN1970 c229 s20

Duplicate to be filed.

21. A duplicate of the claim for lien, bearing the registrar's certificate of registration, shall be filed in the Registry of the Supreme Court on or before the trial of the action.

RSN1970 c229 s21;1986 c42 s153 Sch B item 51

Status of lien claimant.

22. Where a claim is registered, the person entitled to a lien shall be deemed to be a purchaser *pro tanto* and a purchaser for valuable consideration within the provisions of the *Registration of Deeds Act*, but, except as herein otherwise provided, that Act does not apply to any lien arising under this Act.

RSN1970 c229 s22

Limit of time for registration.

23. (1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or of the subcontract or within 30 days after the completion or abandonment of the contract or of the subcontract, as the case may be.

Materials.

(2) A claim for lien for materials may be registered before or during the placing or furnishing of the materials, or within 30 days after the placing or furnishing of the last material so placed or furnished.

Services.

(3) A claim for lien for services may be registered at any time during the performance of the service or within 30 days after the completion of the service.

Wages.

(4) A claim for lien for wages may be registered at any time during the doing of the work for which the wages are claimed or within 30 days after the last work was done for which the lien is claimed.

Notice of claim to holdback.

(5) Where there is no lien on the land by virtue of Section 6, any person who is asserting a claim under subsection 13(5) for work done or materials placed or furnished shall give notice in writing of his claim to the owner, to every person in whose hands are sums retained under Section 13 to which his claim may relate and to the municipal authority, if any, in whose area of authority the land is situate within 30 days after the completion or abandonment of the work or the placing or furnishing of the materials.

RSN1970 c229 s23

Expriy and Discharge

Expiry of liens.

24. (1) Every lien for which a claim is not registered ceases to exist on the expiration of the time limited in Section 23 for the registration thereof.

Registration of certificate of action.

(2) Upon an action under this Act being commenced, a certificate of action shall be registered in the registry.

Granting of certificate of action.

(3) The certificate referred to in subsection (2) may be granted by the clerk of the court.

Vacating orders.

(4) Where a certificate of action has been registered for 1 year or more in the registry and no appointment has been taken out for the trial of the action, the judge may, upon the application *ex parte* of an interested person, make an order vacating the certificate of action and discharging all liens depending thereon.

When lien to cease if registered and not proceeded upon.

25. (1) Every lien for which a claim is registered ceases to exist on the expiration of 90 days after the work has been completed or the materials have been placed or furnished, unless in the meantime an action is commenced to realize the claim or in which a subsisting claim may be realized, and a certificate is registered as provided by Section 24.

Expiration of claim.

(2) Every claim asserted under subsection 13(5) for work done or materials placed or furnished ceases to exist on the expiration of 90 days after

(a) the work has been completed or abandoned; or

(b) the materials have been placed or furnished,

unless in the meantime an action under this Act is commenced to realize the claim or in which a subsisting claim may be realized.

Idem.

(3) Subsection 24(2) does not apply to an action referred to in subsection (2) of this section, but Sections 31, 33, 34, 35, 36 and 37 apply *mutatis mutandis* to such an action.

RSN1970 c229 s25;1974 No84 s25

Assignment or death of lien claimant .

26. The rights of a lien claimant may be assigned by an instrument in writing and, if not assigned, upon his death such rights pass to his personal representative.

RSN1970 c229 s26

Discharge of lien.

27. (1) A claim for lien may be discharged by the registration of a receipt acknowledging payment

(a) where made by a lien claimant that is not a corporation, signed by the lien claimant or his agent duly authorized in writing and verified by affidavit; or

(b) where made by a lien claimant that is a corporation, sealed with its corporate seal or signed by an officer of the corporation and verified by affidavit,

and the registrar shall number and index each receipt and enter particulars of the receipt in a memorandum on the margin of the entry in the registry of the claim for lien to which the receipt relates.

Security or payment into court and vacating lien and certificate of action.

(2) Upon application, the court may, at any time,

(a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of other subsisting lien claimants, together with such costs as it may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated;

(b) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or

(c) upon proper grounds, dismiss the action.

Effect of order under paragraph (a) or (b) of subsection (2).

(3) Notwithstanding sections 24 and 25, where an order to vacate the registration of a lien is made under paragraph (2)(a) or (b), the lien does not cease to exist for the reason that no certificate of action is registered.

Money paid into court.

(4) Any money so paid into court, or a bond or other security for securing the like amount and satisfactory to the court, takes the place of the property discharged and is subject to the claims of every person who has at the time of the application a subsisting claim for lien or given notice of the claim under subsection 13(6) or under Section 16 to the same extent as if the money, bond or other security was realized by a sale of the property in an action to enforce the lien, but such amount as the court finds to be owing to the person whose lien has been so vacated is a 1st charge upon the money, bond or other security.

Where notice of application to vacate not requisite.

(5) Where the certificate required by Section 24 and 25 has not been registered within the prescribed time and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate, the order vacating the lien may be made *ex parte* upon production of a certificate of result of search

referred to in subsection 36(2) of the *Registration of Deeds Act*, together with a certified copy of the registered claim for lien, and, for the purposes of subsection 36(3) of the *Registration of Deeds Act*, the applicant under this subsection (5) is deemed to be a person entitled to a search and certificates or copies of certificates referred to in the said Section 36 of the *Registration of Deeds Act*.

Payment of money out of court.

(6) Where money has been paid into court or a bond deposited in court under an order under subsection (2), the court may, upon such notice to the parties as the court may require, order the money to be paid out to the persons entitled thereto or the delivery up of the bond for cancellation, as the case may be.

Registration number.

(7) An order discharging a claim for lien or vacating a certificate of action shall be registered by registering the order or a certificate thereof, under the seal of the court, that includes a description of the land and a reference to the registration number of every registered claim for lien and certificate of action affected thereby.

Subsection 13(4) applies to registration of a certificate of action.

(8) Subsection 18(4) applies *mutatis mutandis* to the registration of a certificate of action.

Indexing of orders discharging liens or vacating certificates of action.

(9) The registrar shall index each order discharging a claim for lien or vacating a certificate of action which is registered under subsection (7) and shall enter particulars of such order in a memorandum on the margin of the entry in the registry of the claim for lien to which the order relates.

RSN1970 c229 s27

Effect generally.

28. (1) The taking of security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof or the taking of any proceeding for the recovery, or the recovery of a personal judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy the lien, unless the claimant agrees in writing that it has that effect.

Where period of credit not expired.

(2) Where any such promissory note or bill of exchange has been negotiated, the lien claimant does not thereby lose his right to claim for lien, if, at the time of bringing his action to enforce it, or

where an action is brought by another lien claimant, he is, at the time of proving his claim in the action, the holder of such promissory note or bill of exchange.

Time for bringing action not extended.

(3) Nothing in subsection (2) extends the time limited by this Act for bringing an action to enforce a claim for lien.

Time for bringing action by person who gave time for payment.

(4) A person who has extended the time for payment of a claim for which he has a claim for lien, in order to obtain the benefit of this section, shall commence an action to enforce the claim within the time prescribed by this Act and shall register a certificate as required by Sections 24 and 25, but no further proceedings shall be taken in the action until the expiration of such extension of time.

RSN1970 c229 s28

Proving claim in action by another party.

29. Where the period of credit in respect of a claim has not expired or there has been an extension of time for payment of the claim, the lien claimant may, nevertheless, if an action is commenced by any other person to enforce a claim for lien against the same property, prove and obtain payment for his claim in the action as if the period of credit or the extended time had expired.

RSN1970 c229 s29

Lien Claimant's Rights to Information

Statement of mortgagee or unpaid vendor.

30. (1) Any lien claimant may in writing at any time demand of a mortgagee or unpaid vendor or his agent the terms of any mortgage on the land or of any agreement for the purchase of the land in respect of which the work was or is to be done or the materials were or are to be placed or furnished and a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be, and, if the mortgagee or vendor or his agent fails to inform the lien claimant at the time of the demand or within a reasonable time thereafter of the terms of the mortgage or agreement and the amount advanced or owing thereon and if he knowingly falsely states the terms of the mortgage or agreement and the amount owing thereon and the lien claimant sustains loss by the refusal or neglect or mis-statement, the mortgagee or vendor is liable to him for the amount of the loss in an action therefor or in an action for the enforcement of a lien under this Act, and subsection 38(4) applies.

Production of contract or agreement.

(2) The court may, on a summary application at any time before or after an action is commencement for the enforcement of the claim for lien, make an order requiring the mortgagee or his agent or the unpaid vendor or his agent to produce and permit any lien claimant to inspect a mortgage or agreement for sale referred to in subsection (1) upon such terms as to costs as the court deems just.

RSN1970 c229 s30

Actions

How claim enforceable

31. (1) A claim for lien is enforceable in a proceeding in the Trial Division.

Filing of statement of claim.

(2) Proceeding under this section shall be commenced by filing a statement of claim in the Registry of the Supreme Court.

Service.

(3) The statement of claim shall be served within 30 days after it is filed, but the court may extend the time for service.

Statement of defence.

(4) The statement of defence in the action shall be delivered within 10 days after the statement of claim has been served, but the court may extend the time for delivery.

Parties.

(5) It is not necessary to make lien claimants parties defendant to the action, but all lien claimants served with the notice of trial shall for all purposes be deemed to be parties to the action.

Motion to speed trial.

(6) After the commencement of the action, a lien claimant or other person interested may apply to the court to speed the trial of the action.

Lien claimants joining in action.

(7) Any number of lien claimants claiming liens on the same land may join in an action, and an action brought by a lien claimant shall be deemed to be brought on behalf of himself or herself and all other lien claimants.

RSN1970 c229 s31;1986 c42 s153 Sch B item 51

32. [Section 32 Repealled 1986 C.42 S.153 Section B, Item 51.]

Where contract covers several buildings.

33. Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying

the materials may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, in case the owner has sold 1 or more of the buildings, the court has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

RSN1970 c229 s33

Power to appoint receiver of rents and profits.

34. (1) At any time after the delivery of the statement of claim, the court may, on the application of any lien claimant, mortgagee or other person interested, appoint a receiver of the rents and profits of the property against which the claim for lien is registered, upon such terms and upon the giving of sucyh security or without security as the court deems just.

Power to direct sale and appoint trustee.

(2) Any lien claimant, mortgagee or other person interested may, before or after judgment, make an application to the court, which may hear *viva voce* or affidavit evidence or both and appoint, upon terms and upon the giving of security or without security as the court deems just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee as the result of any of the powers conferred upon him or them under this subsection, such money takes priority over every claim of lien existing as of the date of the appointment.

Property offered for sale.

(3) Any property directed to be sold under subsection (2) may be offered for sale subject to a mortgage or other charge or encumbrance if the court so directs.

Proceeds to be paid into court.

(4) The proceeds of any sale made by a trustee or trustees under subsection (2) shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, in so far as applicable, Section 39 applies.

Orders for completion of sale.

(5) The court shall make all necessary orders for the completion of any mortgage, lease or sale authorized to be made under subsection (2).

Vesting of title.

(6) Any vesting order made of property sold by a trustee or trustees appointed under subsection (2) vests the title of the property free from all claims for liens, encumbrances and interests of any kind, except in cases where sale is made subject to any mortgage, charge, encumbrance or interest as hereinbefore provided.

Orders for implementation of powers of trustee.

(7) The court shall make all necessary orders to enable the trustee or trustees referred to in subsection (2) to carry out and implement powers conferred on him or them under the said subsection.

RSN1970 c229 s34

Order for preservation of property.

35. At any time after delivery of the statement of claim and before judgment, or after judgment and pending the hearing and determination of any appeal, any lien claimant, mortgagee or other interested persons may make an application to the court having jurisdiction to try the action, which court may hear *viva voce* or affidavit evidence or both and make an order for the preservation of any property pending the determination of the action and any appeal.

RSN1970 c229 s35

Consolidation of actions.

36. Where more actions than 1 are brought to realize liens in respect of the same land, the court may, on the application of any party to any 1 of the actions or on the application of any other person interested, consolidate all such actions into 1 action and award the conduct of the consolidated action to any plaintiff as the court deems just.

RSN1970 c229 s36

Transferring carriage of proceedings.

37. Any lien claimant entitled to the benefit of an action may at any time apply to the court for the carriage of the proceedings, and the court may make an order awarding that such lien claimant the carriage of the proceedings.

RSN1970 c229 s37

Appointing day for trial.

38. (1) After

(a) the delivery of the statement of defence, where the plaintiff's claim is disputed, and upon 4 days' notice to the other party, either party may apply; or

(b) the time for delivery of defence in any case not referred to in paragraph (a), either party may apply *ex parte* to a judge to fix a day for the trial, thereof and the judge shall appoint the time and place of the trial, and the order, signed by the judge, shall form part of the record of the proceedings.

Notice of trial and service.

(2) The party obtaining an appointment for the trial shall, at least 10 clear days before the day appointed, serve notice of trial upon the solicitors for the defendants who appear by solicitors and upon the defendants who appear in person, and upon all the lienholders who have registered their claims as required by this Act or of whose claims he has notice, and upon all other persons having any charge, encumbrance or claim on the land subsequent in priority to the lien, who are not parties, and such service shall be personal unless otherwise directed by the judge, who may direct in what manner the notice of trial is to be served.

Idem.

(3) Where any person interested in the land has been served with a statement of claim and makes default in delivering a statement of defence, he shall nevertheless be served with notice of trial and is entitled to defend on such terms as to costs and otherwise as the court deems just.

Trial.

(4) The court shall

(a) try the action, including set-off and counterclaim, and all questions that arise therein or that are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served;

(b) take all accounts, make all inquiries, give all directions and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial; and

(c) embody the results of the trial in a judgment, which judgment may direct payment forthwith by the person or persons primarily liable to pay the amount of the claims and costs as ascertained by the judgment, and execution may be issued therefor forthwith.

Power to vary form of judgement.

(5) The form of the judgment may be varied by the court in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment to which he may be entitled.

Sale.

(6) The court may order that the estate or interest charged with the lien be sold, may refer the conduct of the sale to the clerk of the court, and may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising the sale.

Letting in lien claimants who have not proved their claims at trial.

(7) A lien claimant who did not prove his claim at the trial, may, on the application to the court, be let in to prove his claim, on such terms as to costs and otherwise as are deemed just, at any time before the amount realized in the action for the satisfaction of liens has been distributed, and, where his claim is allowed, the judgment shall be amended so as to include his claim.

Action may be tried by any judge having jurisdiction.

(8) An action may be tried by a judge of the court having jurisdiction to try the action notwithstanding that the time and place for the trial thereof were appointed and fixed by another such judge.

Applications for directions.

(9) Any party to an action under this Act or any other interested person may apply to the court for directions as to pleadings, production or any other matter relating to the action, including the cross-examination of a lien claimant or his agent or assignee on his affidavit verifying the claim.

RSN1970 c229 s38

Report on where sale is had.

39. (1) Where a sale is had, the moneys arising therefrom sale shall be paid into court to the credit of the action, and the court shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the action his fees and actual disbursements incurred in connection with the sale, and, where sufficient to satisfy the judgment and costs is not realized from the sale, the court shall certify the amount of the deficiency and the names of the persons who are entitled to recover the same

showing the amount that such is entitled to recover and the persons, adjudged to pay the same, giving credit for payments, if any, made under subsection 38(4) and the persons so entitled may enforce payment of the amount so found to be due by execution or otherwise.

Completion of sale.

(2) The court may make all necessary orders for the completion of the sale and for vesting the property in the purchaser.

RSN1970 c229 s39

Where lien not established.

40. Where a lien claimant fails to establish a lien, he may nevertheless recover a personal judgment against any party to the action for such sum as may appear to be due to him and which he might recover in an action against such party.

RSN1970 c229 s40

Right of lienholder whose claims are not payable to share in proceeds.

41. Where property subject to a lien is sold in an action to enforce a lien, every lienholder is entitled to share in the proceeds of the sale in respect of the amount then owing to him although the same or part thereof was not payable at the time of the commencement of the action or is not then presently payable.

RSN1970 c229 s41

42. [Section 42 Repealed. 1986 C42 S.153 Sech. B. Item 51.]

Appeal

Appeal.

43. An appeal lies from an order or decision under this Act to the Court of Appeal.

RSN1970 c229 s43;1986 c42 s153 Sch B item 51

Certain judgments final.

44. A judgment in respect of a claim or counterclaim for an amount not exceeding $200 is final and without appeal.

RSN1970 c229 s44

Fees and Costs

Fees and costs.

45. (1) Subject to subsection (2), the fees and costs in all proceedings taken to realize a lien under this Act shall be such as

are payable in respect of the like or similar matters, according to the ordinary procedure of the court.

Costs of drawing and registering and vacating registration of lien.

(2) Where a lien is discharged or vacated under Section 27 or where judgment is given in favour of or against a claim for a lien, in addition to the costs of the action, the judge may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration thereof but this does not apply where the claimant fails to establish a valid lien.

RSN1970 c229 s45

Rules

Rules

46. (1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

Interlocutory proceedings.

(2) Except where otherwise provided by this Act, no interlocutory proceedings shall be permitted without the consent of the court, and then only upon proper proof that such proceedings are necessary.

Assistance of experts.

(3) The court may, for the purpose of determining any matter of fact in question, obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or person, and the court may fix the remuneration of any such person and direct payment thereof by any of the parties.

Rules of Supreme Court to apply.

(4) Unless otherwise provided in this Act, the Rules of the Supreme Court apply to proceedings under this Act.

RSN1970 c229 s46;1986 c42 s153 Sch B item 51

Service of Documents

Service of documents.

47. Except where otherwise directed by the court, all documents relating to an action under this Act, other than statements of claim and notices of trial, are sufficiently served upon the intended recipient if sent by registered mail addressed to him at his address for service.

RSN1970 c229 s47

Liens On Chattles

Right of chattel lienholder to sell chattel.

48. (1) Every person who has bestowed money, skill or materials upon a chattel or thing in the alteration or improvement of its properties or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon the chattel or thing for the amount or value of the money or skill and material bestowed, has, while the lien exists but not afterwards in case the amount to which he is entitled remains unpaid for 3 months after it ought to have been paid, the right, in addition to another remedy to which he may be entitled, to sell by auction the chattel or thing on giving 1 week's notice by advertisement in *The Newfoundland Gazette* and in a newspaper circulating in the place in which the work was done, setting forth the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence, if any, of the owner.

Application of proceeds of sale.

(2) A person referred to in subsection (1) shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale and shall, upon application, pay over any surplus to the person entitled thereto.

RSN1970 c229 s48

Taking of Affidavits

Persons before whom affidavits may be taken.

49. (1) Affidavits required under this Act may be taken within the province before

(a) the Registrar of Deeds or the Deputy Registrar of Deeds;

(b) a judge of the Supreme Court;

(c) a Provincial Court judge;

(d) a Commissioner of the Supreme Court;

(e) a notary public under his official seal;

(f) a Commissioner for Oaths in and for the province, including a barrister referred to and under the conditions specified in Section 4 of the *Commissioners for Oaths Act;* or

(g) a justice of the peace.

(2) Affidavits required by this Act may be taken outside the province before

(a) a judge of a court of record, under the seal of such court;

(b) the mayor of a city or town, under the seal of such city or town;

(c) any of the Crown's consuls or vice-consuls;

(d) a Commissioner of the Supreme Court of Newfoundland;

(e) a Commissioner for Oaths without Newfoundland; or

(f) a notary public, under his official seal.

Certain seals and signatures accepted without proof.

(3) It shall not be necessary for the purpose of registration under this Act to prove or certify the seal or signature of any such court, city or town, judge, Provincial Court judge, mayor, consul, vice-consul, justice of the peace, commissioner or notary public attached, appended or subscribed to any such affidavit.

Taking of affidavit by solicitor for any of parties.

(4) No affidavit made under this Act shall be held to be defective or void solely on the ground that it was taken before a solicitor for any of the parties to the document or before a partner of that solicitor.

RSN1970 c229 s49;1979 c38 s7;
1986 c42 s153 Sch B item 51

Regulations

Regulations

50. (1) The Lieutenant-Governor in Council may make regulations not inconsistent with this Act as he deems necessary or advisable for the more effective carrying out of the purposes of this Act according to its true spirit, intent and meaning and for dealing

with any matters for which no express provision has been made or in respect of which only partial or imperfect provision has been made, and without prejedice to the generality of the foregoing, may make regulations

(a) prescribing forms for use under or for the purposes of this Act and providing for the use of such forms;

(b) prescribing fees for the registration of documents under this Act and any other fees in connection with the administration of this Act and the regulations made under this Act;

(c) providing for the holding of inquiries into the operation of this Act and into any charge or complaint that any person has contravened any provision of this Act or the regulations, or has made a false statement in a form or other document required to be completed or made under this Act or the regulations, or into another matter arising in the administration of this Act, and providing that the person holding such inquiry shall have any or all of the powers that are or may be conferred upon a Commissioner by or under *The Public Inquiries Act*, including the power to take evidence under oath; and

(d) respecting a matter, whether of any of the foregoing kinds or not, necessary or advisable to carry out effectively the intent and purpose of this Act.

Publication.

(2) Regulations made under subsection (1) shall be published in *The Newfoundland Gazette* and shall have effect from the date of publication or from such earlier or later date as may be stated in the regulations, and the regulations shall be laid before the Legislature within fifteen days after they are made if the Legislature is then in session, and, if it is not, then within fifteen days after the commencement of the next ensuing session.

Disposition of fees.

(3) The registrar shall pay all fees collected by him under this Act through the Department of Justice into the Consolidated Revenue Fund.

RSN1970 c229 s50

51. [Section 51 Repealed. 1986 C. 42 S. 153 Sech. B Item 51.]